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REPORTS

OF

513

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING A PART OF

JUNE TERM, 1853,

AND THE WHOLE OF

JANUARY TERM, 1854.

BY J. W. SHEPHERD,
STATE REPORTER.

40584

VOL. XXIV.

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OFFICERS OF THE SUPREME COURT.

DURING THE TIME OF THESE DECISIONS.

WILLIAM P. CHILTON, Chief Justice.

DAVID G. LIGON,
GEORGE GOLDTHWAITE,
JOHN D. PHELAN,*
LYMAN GIBBONS,†
} Associate Justices.‡

M. A. BALDWIN, Attorney General.
JOHN D. PHELAN, Clerk.

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*Resigned February 1, 1854.

†Resigned January 5, 1854.

‡By an act of the General Assembly, approved February 1, 1854, the number of Judges on the Supreme Court bench was reduced to three.

TABLE OF CASES.

Abernathy v. Boazman, 189
Alabama Life Insurance and Trust Company v. Pettway, 544
Amason et al. v. Nash, Judge, &c., 279
Armour *and* Fowler & Prout, 194
Ashby *and* Stein, 521
Baber's Adm'rs *and* Ferguson & Scott, 402
Bank of Georgia et al. *and* Coster's Executors, 37
Barrett v. The State, 74
Barry *and* Napier et al., 511
Beason *and* Brown, 466
Beck, ex'r &c., *and* Reese, 651
Bendall's Distributees v. Bendall's Adm'r, 295
Billingsley v. Billingsley, 518
Black's Adm'r *and* Henry, 417
Boazman *and* Abernathy, 189
Boltze v. The State, 89
Bonham et al. *and* Walton, adm'r, 513
Boykin v. Kernochan, 697
Branch Bank at Montgomery *and* Brewer, 439
Brantly v. Swift, 390
Brewer v. Br. Bk. Montgomery, 439
Brown v. Beason, 466
Brown v. Jones, 463
Brown & Wife v. Clements & Hunt, 354
Burden *and* Stein, 130
Bush & Co. v. Jackson, 273
Calhoun *and* Davis, 437
Calhoun *and* Davis, 455
Camp *and* Perryman, 438
Campbell *and* Hagadon, 375
Cartledge *and* Ware, 622
Central Plank Road Co. *and* Powell, 441
Chighizola's Heirs v. Eslava, 237
City Council of Montgomery Ex parte, 98
Clay *and* Moore, 235
Clements & Hunt v. Doe ex dem. Brown & Wife, 354
Clowney *and* Ware, 707
Cole *and* Turner et al., 364
Coleman *and* Maury, 381
Collier v. Frierson et al., 100
Commissioners' Court of Green Co. *and* Creswell & Monette, 282
Cook, guardian &c., v. Wimberly et al., 486
Cook & Scott v. Parham, 21
Coster's Executors v. Bank of Georgia et al., 37
Cothran v. Lee, 380
Cowles *and* Ware, 446
Cox *and* Wray, 337
Creswell & Monette v. Commissioners' Court of Green Co., 282
Crommelin *and* Saltmarsh et al., 347
Crook *and* Wesson et al., 478
Cunningham *and* Slaughter, 260
Darby *and* Prater's Adm'r, 496
Darrington & Savage v. Walsh & Emanuel, 293
Davis v. Calhoun, 437
Davis v. Calhoun, 455
Doe ex dem. Brown & Wife v. Clements & Hunt, 354
Doe ex dem. Eddins *and* Elliot, 508
Doe ex dem. Eslava *and* Chighizola's Heirs, 237
Dowdle *and* Summerlin, 428
Driver *and* Lanier, 149
Drummond *and* Robinson, 174
Easley, adm'r, *and* McNeill & Furniss, 455
Eddins *and* Elliot, 508
Elliot v. Doe ex dem. Eddins, 508
Emanuel & Walsh *and* Savage & Darrington, 293
Eslava *and* Chighizola's Heirs, 237
Ex parte City Council of Montgomery, 98
Ex parte Edward Henry, 638
Ex parte Pickett, 91

Ferguson & Scott v. Baber's Administrators, 402
Florey's Executors v. Florey, 241
Fowler & Prout v. Armour, 194
Frierson et al. *and* Collier, 100
Furniss & McNeill v. Easley, 455
Gardner et al. *and* Malinda & Sarah, 719
Garrett et al. v. Holloway & Malone, 376
Gibson v. Hatchett & Brother, 201
Gilbreath v. Manning et al., 418
Givhan et al. *and* Montgomery, 568
Glass v. Glass, 468
Golding v. Golding's Adm'r, 122
Governor v. Frierson et al., 100
Graham *and* Jones, 450
Gray v. Jenkins, 516
Gwynn & Wife *and* Hamilton, administrator, 515
Hagadon *and* Campbell, 375
Hale et al. v. The State, 80
Hall *and* Millard's Adm'rs, 209
Hamilton, adm'r v. Gwynn & Wife, 515
Hamner, adm'r, v. Mason et al., 480
Harris et al. v. Nesbit, 398
Harrison v. The State, 67
Hatchett & Bro. *and* Gibson, 201
Henderson & Slocum *and* Frankenheimer, 373
Henry Ex parte, 638
Henry v. Black's Adm'r, 417
Holloway & Malone *and* Garrett et al., 376
Isbell v. Maclin et al., 315
Iverson *and* Nelson, 9
Jackson *and* Bush & Co., 273
Jeffries' Adm'r *and* Townsend et al, 329
Jenkins *and* Gray, 516
Jones *and* Brown, 463
Jones *and* Weaver, 420
Jones v. Graham, 450
Kernochan *and* Boykin, 697
King *and* Shackelford, 158
Kirkland *and* Self, 275
Lanier v. Driver, 149
Lawson's Adm'r v. Lay's Ex'r, 184
Lay's Ex'r *and* Lawson's Adm'r, 184
Lee *and* Cothran, 380
Logan v. The State, 182
Maclin et al. *and* Isbell, 315
Malinda & Sarah v. Gardner et al., 719
Mallory's Ex'r *and* Smith & Co., 628
Malone & Holloway *and* Garrett et al., 376
Manning v. Manning, 386
Manning et al. *and* Gilbreath, 418
Mason et al. *and* Hamner, adm'r, 480
Maury v. Coleman, 381
Mayor &c. of Mobile *and* The State ex rel. Waring, 701
Mayor &c. of Mobile *and* Stein, 591
Mayor &c. of Wetumpka *and* Smoot, 112
McArdle & Waters *and* Stein, 344
McElhaney v. The State, 71
McGehee et al. *and* Spivey, 476
McNeill & Furniss v. Easley, 455
Mealing *and* Steele, 285
Melton v. Watkins, 433
Millard's Adm'rs v. Hall, 209
Montgomery v. Givhan et al., 568
Montgomery, Ex parte City Council of, 98
Moore v. Clay, 235
Moore v. Levert, 310
Moseley v. Wilkinson, 411
Myatt & Moore *and* Scott, 489
Napier et al. v. Barry, 511
Nash, Judge &c., *and* Amason et al., 279
Nelson v. Iverson, 9
Nesbit *and* Harris et al., 398
Nixon v. Robbins, ex'r &c. 663
Nolen v. Palmer, 391
Noles v. The State, 672
Palmer *and* Nolen, 391
Palmer *and* Walker, 358
Parham *and* Cook & Scott, 21
Pearson *and* Smith et al., 355
Perryman v. Camp, 438
Pettway *and* Ala. Life Ins. & Trust Company, 544
Pickett, Ex parte, 91
Pinckard's Distributees v. Pinckard's Adm'rs, 250
Pitts v. Wooten's Ex'rs, 474
Plank Road Co. *and* Powell, 441
Pond v. Wadsworth, 531
Pounds *and* Wheeler, 472
Powell v. Cent. Plank Road Co., 441
Prater's Adm'r v. Darby, 496
Reaves *and* Stevenson, 425

Reese v. Beck, ex'r &c., 651
Richardson's Adm'r v. Richardson et al., 395
Robbins, ex'r &c., *and* Nixon, 663
Robinson v. Drummond, 174
Roundtree *and* Salmons, 458
Rumbly v. Stainton & Wife, 712
Salmons v. Roundtree, 458
Saltmarsh et al. v. Crommelin, 347
Sarah & Malinda v. Gardner et al., 719
Savage & Darrington v. Walsh & Emanuel, 293
Scott v. Myatt & Moore, 489
Scott & Cook v. Parham, 21
Scott & Ferguson v. Baber's Administrators, 402
Self v. Kirkland. 275
Shackelford v. King, 158
Shackelford's Adm'r *and* Tate, 510
Simmons & Simmons *and* Stainton's Adm'rs, 410
Slaughter v. Cunningham, 260
Slocum & Henderson *and* Frankenheimer, 373
Smith & Co., v. Mallory's Ex'r, 628
Smith et al. v. Pearson, 355
Smoot v. Mayor &c. of Wetumpka, 112
Spencer, adm'r, v. Thompson & Wife, 512
Spivey v. McGehee et al., 476
Stainton & Wife *and* Rumbly, 712
Stainton's Adm'r v. Simmons, 410
State *and* Barrett, 74
State *and* Boltze, 89
State *and* Hale et al., 80
State *and* Harrison, 77
State *and* Logan, 182
State *and* McElhaney, 71
State *and* Noles, 672
State *and* Tucker, 77
State *and* Van Dyke, 81
State ex rel. Waring v. Mayor &c. of Mobile, 701
Steele v. Mealing, 285
Stein v. Ashby, 521
Stein v. Burden, 130
Stein v. Mayor &c. of Mobile, 591
Stein v. McArdle & Waters, 344
Stevenson v. Reaves, 425
Summerlin v. Dowdle, 428
Swift *and* Brantly, 390
Tate v. Shackelford's Adm'r, 510
Thompson & Wife *and* Gwynn, adm'r, 512
Townsend et al. v. Jeffries' Adm'r, 329
Tucker v. The State, 77
Turner et al. v. Cole, 364
Van Dyke v. The State, 81
Wadsworth *and* Pond, 531
Walker v. Palmer, 358
Walsh & Emanuel *and* Savage & Darrington, 293
Walton, adm'r, v. Bonham et al., 513
Ware v. Cartledge, 622
Ware v. Clowney 707
Ware v. Cowles, 446
Watkins *and* Melton, 433
Weaver v. Jones, 420
Wesson et al. v. Crook, 478
Wheat v. Wheat's Ex'r, 429
Wheeler v. Pounds, 472
Wilkinson *and* Moseley, 411
Wimberly et al. *and* Cook, guardian, &c., 486
Wooten's Ex'rs *and* Pitts, 474
Wray v. Cox, 337

REVISED RULES,

IN CONFORMITY WITH THE CODE, FOR THE REGULATION OF THE PRACTICE IN CHANCERY IN THE STATE OF ALABAMA, ADOPTED BY THE SUPREME COURT OF SAID STATE, AT JUNE TERM, 1854.

GENERAL REGULATIONS.

1. The Courts of Chancery shall be deemed always open, for the purpose of filing bills, answers, and other pleadings; for issuing and returning original (and) mesne process and commissions by the Register; and for making, by and before the Chancellor, all interlocutory motions, orders, decrees, and other proceedings not affecting the merits of causes, but preparatory to their hearing upon the merits; and, also, for carrying into execution the decrees and orders of such Chancery Courts and Chancellors. This Rule includes the hearing of appeals from the Register; which motions and appeals can be heard, in vacation, at any time or place (within the State), upon ten days' notice of the time and place of making the same, and the decree or order made and forwarded to the Register from that or any other place.

2. Registers in Chancery, during the vacation of their respective courts, may make and direct all such interlocutory orders, decrees, and other proceedings not affecting the merits, nor extending to the decision of demurrers, or testing the equity of the bill, the granting or dissolving of injunctions, or the setting aside of writs of *ne exeat* or equitable attachments, or to any other order which is required by the statute to be made by the Chancellor in court, but preparatory to the hearing of all causes upon their merits. Such orders and decrees shall have the same effect as if made by the Chancellor; subject, however, in all cases, to the control of the latter, by appeal, to be heard and decided by him either in vacation or term time. When an appeal shall be taken from the Register, to the Chancellor or Court, he shall certify the appeal, in the nature of a report.

3. The Register shall keep a book, in which shall be entered all decrees and orders taken before him. The solicitor of the party applying to the Register for any decree or order, shall draw the same out with care, describing the cause, the date of the application, and the notice given to the adverse party. If such decree or order shall be granted, the Register shall endorse thereon "granted," and date and sign the same, and cause the said order, application and grant to be transcribed on said book; which book shall be one of the records of his office.

4. Decrees and orders may be applied for before the Register every Monday, except in those cases in which notice to the adverse party may be necessary; such orders and decrees shall only be applied for on the first Monday of every month, unless special showing be made, when the Register may make them at an earlier day. If the Register should not get through the business before him on any rule day, he may continue his sittings, from day to day, until the business is disposed of.

5. No notice shall be necessary to obtain an order of publication against a defendant, a decree *pro confesso*, an order appointing a guardian *ad litem*, an attachment against the body or effects, a writ of sequestration, or to examine as a witness a party defendant subject to all legal exception; but in all other cases, not otherwise directed by statute or in these Rules, decrees and orders shall only be made by the Register upon five days' notice to the adverse party, which notice must be in writing, and must set forth the nature of the decree or order applied for, a copy of which shall be filed with the Register.

6. In all cases where the Register is interested, or related to the parties within the fourth degree by consanguinity or affinity, the orders in the cause, and the hearing and decision of exceptions, shall be made by, and heard before the Chancellor in the first instance. The Register, however, in such cases, shall issue all process, and make the records, and keep the files; if an account is required, it must be taken by a special Register.

7. In all cases, where the statutes of this State, the decisions of this Court, or the Rules prescribed by it, do not apply, the Practice in Chancery shall be regulated by the

Rules, Orders and Practice of the English Court of Chancery (prior to, and including, those of May, 1845, but not afterwards), so far as the same may reasonably be applied consistently with the institutions of this country, not as positive Rules, but as furnishing proper analogies to regulate the Practice.

BILLS.

8. The stating part of all bills must be divided into paragraphs, and numbered consecutively 1, 2, 3, &c.

9. Bills which contain blanks, shall be considered defective, and may be ordered to be taken off the file.

10. The complainant shall make a note in writing, at the bottom of the bill, as to the particular statements or interrogatories, by number, which he desires each defendant to answer; and the answer need not go beyond such requisition, except for such defendant's own protection.

11. The interrogatories contained in the interrogating part of such bill, shall be divided from each other, as conveniently as may be, and numbered consecutively 1, 2, 3, &c.

12. The note at the foot of such bill, specifying the statement or interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to such bill, or any alteration in, or addition to such note after the bill is filed, shall be treated as an amendment to the bill.

13. Instead of the words heretofore in use, preceding the interrogating part of the bill, and beginning with the words "To the end therefore," such interrogating part in such bills shall be to the effect following: "To the end, therefore, that the said defendants may show why your orator should not have the relief hereby prayed, and may, upon their respective oaths, and according to the best and utmost of their respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the statements or the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say: 1. Whether" &c. "2. Whether" &c.

14. All bills and petitions shall be signed by a solicitor of the Court, except where a party prosecutes in his own

proper person, and then it shall be signed by such complainant or petitioner; and where there is a note at the foot of the bill, as directed under the foregoing Rules, the same shall be signed in like manner.

15. All bills and petitions filed by married women, without their husbands, whether relating to their separate estate or not, shall be exhibited by next friend.

16. In all injunction and other bills and petitions required to be sworn to, the oath or affirmation may be administered and certified by any of the officers named in section 2896 of the Code of Alabama. A bill may be sworn to by an agent, or attorney; but the affidavit must set forth a sufficient reason why it is not verified by the complainant himself.

17. The copies of all documents appended as exhibits to bills, petitions and answers, shall be deemed, taken and held as parts of such bills, petitions and answers; and the admission of such exhibits in the answer, dispenses with proof thereof.

18. The prayer for process or publication to answer a bill, shall contain the names of all the defendants. If an injunction, *ne exeat*, or any other special order, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

PROCEEDINGS TO OBTAIN ANSWER.

19. Married women may be made defendants by service of summons to answer upon their husbands, if residents and living together, if living apart by personal service on each, or by order of publication if non-residents; and the copy of the order of publication shall be transmitted to the husband, in all cases, except where the separate estate of the wife is the object of the bill, and then the summons shall be served on her, or the copy of the order of publication be transmitted to her.

20. Summons to answer bills issuing against infants, may be served upon their parents, or either of them, if in life, or, in case they are dead, upon the general guardian of such infant; *provided* such parent or guardian has not an interest adverse to such infant. When there is no parent or guardian, or their interest is adverse to the infant, if the infant is over fourteen years of age, then the service shall be upon such

infant personally; and if the infant is under the age of fourteen, then the summons must be served upon such person as may have the maintenance or charge of such infant, unless opposed in interest. And should there be any case not provided for by statute, or by this or some other Rule, and proof be made before the Chancellor, he may direct the mode of service, or appoint a guardian *ad litem* for such infant without service.

21. Domestic corporations may be served with process, by executing it upon the president, or other head thereof, secretary, cashier, or managing agent thereof. If affidavit is made that the officers named in the preceding part of this Rule are unknown, absent from, or reside out of the State, the process may be served upon any white person in the employ of such corporation, or doing business for it.—Process may be served on foreign corporations, by executing it upon any agent of such corporation, or white person in its employ in this State, or by publication, a copy of which may be sent to any of the officers named in the first part of this Rule. If a summons to answer a bill is personally served on the agent or person in the employ of such foreign corporation, such agent or employee may be required to answer on oath, as in case of other defendants to bills, and under like penalties.

22. Where a defendant is shown by the affidavit of the complainant or his agent, appended to the bill or otherwise, to be, in the belief of such affiant, either a non-resident, or that his residence is unknown, or, if a resident, that he has been absent from the State more than six months from the filing of the bill, or that he conceals himself so that process cannot be served upon him; and such affidavit further states the belief of the affiant as to the age of the defendant being over or under twenty-one years, or, if the residence and age of the defendant are unknown to the person making the affidavit, states that the same are unknown, or, if the bill sets forth the facts required to be stated in said affidavits, and is sworn to, it shall be the duty of the Register in vacation, or Chancellor in term time, to make an order against such defendant, requiring him to answer or demur to said bill before a day to be therein named, not less than fifty nor more than seventy days from the making thereof. The

Register shall have all orders of publication against defendants, whether made by the Chancellor or himself, published, with as little delay as may be, in such newspaper as may be designated in the order, once a week for four consecutive weeks; a copy of which order he shall post up at the door of the court-house of the county, or other place where the court sits, and shall send, by mail, another copy thereof to the defendant, where his residence is shown by the bill or affidavit, as aforesaid; which copies shall be posted up, and sent by mail, within twenty days from the making of said order.

23. If an infant of fourteen years of age, fails to name a guardian *ad litem* within thirty days after the summons, or after perfecting publication, the Chancellor or Register in vacation, or the Chancellor in term time, shall appoint such guardian, who may be superseded by the infant appearing, either before the Chancellor or Register in vacation, or the Chancellor in term time, and making choice of another, or having such choice certified by a justice of the peace to the Court, Chancellor or Register, and on the guardian *ad litem* so appointed, if necessary, putting in an answer for such infant forthwith. In all cases, a minor of fourteen years of age may have his or her choice of a guardian *ad litem* certified by a justice of the peace. No one shall be appointed guardian *ad litem*, unless he consent in writing to act as such.

24. If a resident defendant of full age, as to whom an answer on oath is not waived, fails to answer, and the complainant or his solicitor wishes to enforce one, he may, after the summons to answer has been served for more than thirty days, apply in writing to the Register for the issue of an attachment against the body of such defendant; and the Register shall issue the same accordingly, without waiting for any order of the Chancellor.

25. If a defendant, against whose body an attachment has been issued to enforce an answer, eludes the service thereof, upon affidavit of the fact by the sheriff or his deputy, and by the complainant or his solicitor of the necessity for an answer to the bill, the Register shall issue a writ of sequestration against the estate of such defendant, directed to any sheriff.

26. An *alias*, *pluries*, or other summons, attachment, or other writ, can issue, without any order therefor.

27. If the complainant shall not, before the second term after the filing of his bill, have taken measures to bring in the defendant, his bill may be dismissed.

28. If the complainant, after the cause is set down to be heard, causes the bill to be dismissed on his application, or if the cause is called on to be heard in court, and complainant makes default, and by reason thereof the bill is dismissed, then, and in such case, such dismissal is, unless the Court otherwise orders, to be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.

29. When an application is made to the Chancellor, in term time or vacation, for a decree *pro confesso* against a defendant, as to whom publication has been made, the Register, before the decree *pro confesso* shall be entered, must certify that publication has been made, and therein state when, and how, and whether the notice was posted up, or forwarded by mail to the defendant, and when; which certificate shall be *prima facie* evidence of the facts therein stated.

DEFENCE.

30. When a demurrer is overruled, the defendant shall forthwith put in a sufficient answer, unless the Chancellor gives further time; and on failure to comply with the order to answer, a decree *pro confesso* may be entered, or an attachment against the body taken, to be followed, if need be, with a writ of sequestration, where a sworn answer is required.

31. Where a defendant resides out of the State, and an answer on oath is not waived, the Register, on the application of the solicitor of such defendant, shall issue a commission, directed to one person or more, to take and certify his answer. The affidavit to the answer shall be attached thereto, and be sworn to and subscribed by the defendant before such commissioners or one of them, and be so certified by him or them, and that such defendant is known to such commissioner. Where an affidavit to a bill or petition, of a party residing out of the State, is necessary, it may be taken and certified in like manner. The answer of a foreign corporation, taken according to law, may be certified by commissioners appointed in like manner.

32. Before a motion can be entertained to dissolve an injunc-

tion upon the denial in the answer of the equity of the bill, the answer must be sworn to, whether an answer on oath is waived in the bill or not. A similar course must be taken to authorize a motion to discharge a *ne exeat* on the answer.

33. A defendant who has excepted to a bill for scandal or impertinence, shall not be placed in contempt for want of an answer, until a decision on the exceptions.

EXCEPTIONS TO BILLS AND ANSWERS.

34. An answer to which the oath of the defendant is waived, cannot be excepted to for insufficiency.

35. Whenever exceptions are filed to a bill or answer in vacation, the Register shall forthwith issue and cause a notice thereof to be served on the opposite party or his solicitor; and if such party does not submit to the allowance of such exceptions, or fails, for the space of five days after the service of such notice, to apply to the Register to fix a day for hearing said exceptions, the Register shall proceed, without delay, to notify both parties of the time when said exceptions will be heard by him, of which five days' notice must be given to the parties; and upon such notice being given, he shall, at the time appointed, proceed to decide on such exceptions, from which decision an appeal may be taken to the Chancellor as in other cases.

36. Should the Register decide, on exceptions to an answer for insufficiency, that the exceptions be allowed, he shall, in his order, name a day when a further answer must be filed; and if the defendant fails to answer by that day, or puts in an insufficient answer, the Register must enter a decree *pro confesso*, or, at the election of the complainant, issue an attachment, to be followed, if need be, by a writ of sequestration, to coerce a sufficient answer.

37. Should the Register allow an exception for scandal or impertinence, he shall draw black lines around such scandalous or impertinent matter, and write across the face thereof, with red ink, "expunged"; *provided* that, in all cases where a party appeals to the Chancellor, all proceedings to obtain a decree *pro confesso*, or to coerce an answer, or to expunge improper matter, shall be suspended, until the decision of the Chancellor is announced.

38. When exceptions to a bill or answer are filed so near

to a term of the Court that the proper notice cannot be given, they shall be heard, at as early a day as practicable, during the term, on one day's notice; and if the decision of the Register is appealed from during term (time), no notice of the hearing upon the appeal shall be required.

AMENDMENTS.

39. Amendments of bills and answers shall be made on a separate piece of paper, unless the amendment be of a brief character, when it may be made by an interlineation or erasure with ink of a different color from the body of the bill or answer; and the amendment shall be made in such manner that it may be ascertained in what it consists.

40. Where amendments are proposed under sections 2905 and 2906 of the Code, the opposite party shall be served with a copy of the proposed amendments, with a notice of the time when the application will be made. When the application is made to the Register, the copy of the amendments, and notice, must be served five days before the application, and when made in term time, one day; but when made to the Chancellor, in vacation, ten days' notice must be given.

41. Amendments allowed to bills, shall be served upon the defendant, or his solicitor, within sixty days after the order of allowance, or the same shall be considered as waived, unless there be an affidavit as to the absence of the defendant, or that he eludes service, or could not be found. The amendment shall be accompanied by a notice to the defendant of the allowance of the same, and that he is required to answer the same, or that an answer is not required. This notice shall be served with the amendment; and on default of the defendant, the same proceedings may be taken as on the original bill for want of an answer.

42. In all cases where the original bill has been answered, no order can be obtained to amend the bill generally, but the amendments must be prepared and proposed as above directed.

43. New facts occurring since the filing of a bill, may be introduced by way of amendment, without a supplemental bill.

44. An amendment to a bill, or the filing of an amended bill, shall not set aside a decree *pro confesso*, as to any defendant to the original or any other bill; nor shall a decree *pro confesso*,

for want of an answer to an amendment or an amended bill, operate as a decree *pro confesso* on the original or any other amended bill already answered.

TESTIMONY.

45. Testimony cannot be taken by either party, until the cause is at issue, by sufficient answer or decree *pro confesso*, as to all the defendants.

46. When a cause is at issue, as laid down in the last Rule, either party, desiring to take testimony, must file his interrogatories in the office of the Register, a copy of which must be served upon the opposite party, as directed in sections 2925 and 2926 of the Code.

47. When a party desires to be present at the examination of a witness against him, he shall give notice to the adverse party, by filing a notice with his cross interrogatories; whereupon it shall be the duty of the Register, to prescribe the notice which he shall receive of the time and place of the execution of the commission.

48. A party against whom a witness has been examined, may re-examine such witness; *provided* he did not file cross interrogatories upon the first examination. The examination under this Rule shall operate as a cross examination of such witness. Both parties shall have the liberty of being present at such re-examination; but the party wishing to re-examine such witness, shall give such notice to the opposite party of the time and place of such re-examination as the Register shall prescribe.

49. Where a party who has filed cross interrogatories, afterwards learns that the witness has a knowledge of facts which he did not know at the time of filing his cross interrogatories, it shall be the duty of the Register, on affidavit made setting forth such facts, to order a re-examination, as in the preceding Rule.

50. When a bill is filed, and before the same is at issue, either by sufficient answer or decree *pro confesso*, as to all the defendants, upon affidavit made that any of the witnesses of the complainant are over sixty years of age, or so infirm that affiant fears that injury will result from delay owing to such infirmity, or about to remove permanently from the State, or a single witness to a material fact, the Chancellor or Register in

vacation, or the Chancellor in term time, shall make an order to take the testimony of such witness or witnesses *de bene esse ;* which testimony shall be taken as the testimony of other witnesses upon interrogatories. In other cases of emergency, to be judged of by the Court, Chancellor, or Register, the witnesses may likewise be examined *de bene esse.* After the examination of a witness *de bene esse,* the party shall not be required to make further examination, but may use the testimony so taken on the hearing; the opposite party, however, shall have the right to retake the testimony of such witnesses. A defendant who has answered the bill, when the cause is not at issue as to other defendants, may, in like manner, and for like causes, examine any of his witnesses *de bene esse.*

51. The complainant in a bill of interpleader, intending to take testimony, must give notice and serve interrogatories upon the parties required to interplead; and if either of the defendants desires to take testimony, he must serve interrogatories as well upon the complainant as upon the adverse defendant; but after a decree of interpleader, it shall not be necessary for either defendant, taking testimony, to serve the complainant with interrogatories or notice.

52. The testimony of witnesses may be impeached by deposition, taken according to the Code and the foregoing Rules, and no articles of impeachment shall, in any case, be filed.

53. A notice shall accompany interrogatories to take the deposition of a witness, giving the names of the commissioner or commissioners. If the opposite party has any objection to such commissioner or commissioners, he shall file his objections within the time prescribed for filing exceptions to interrogatories; and the same shall be heard by the Register and decided, and the decision reviewed, as in case of interrogatories. If the Register overrules the objection, the commission shall issue to the person or persons proposed; if he allows the same, he shall appoint some other person or persons free from objection to execute the commission.

54. The several Chancellors in this State shall, within their respective divisions, have power to appoint one or more examiners in each county to take and certify the depositions of witnesses, who shall be officers of the Chancery Court, and sworn faithfully to discharge the duties of their office; and if, upon filing interrogatories, no commissioner shall be named by

the complainant or his solicitor, nor any other person than the examiner suggested by the defendant or his solicitor, the deposition shall be taken by such examiner, without any commission from the Register; but either party may, by writing, endorsed on the interrogatoreis or cross interrogatories, require the examiner to give him notice of the time and place of taking the testimony. Such examiners shall have the like power to compel the attendance of witnesses, and shall be entitled to the same fees, as are allowed to commissionors by the existing laws.

55. Hereafter, when a party files interrogatories to examine a witness or witnesses, he shall give the name or names of the witnesses and the place or places of their residence, or make affidavit that the same is unknown; and on failure to do so, no commission shall issue, nor proceedings be had, on said interrogatories, except by consent of the opposite party or his solicitor.

56. A defendant against whom a decree *pro confesso* shall be in force, shall not be served with a copy of the interrogatories, or any notice of the taking of the testimony; nor shall it be necessary, in such case, that the interrogatories shall be filed in the Register's office any number of days before a commission issue. In all cases, the parties can waive the ten days' service of interrogatories, and a consent in writing to the issue of a commission shall be deemed a waiver.

57. Depositions shall be sealed up, with the commission, by the commissioner, with the title of the case and the names of the witnesses endorsed on the envelope; and the package shall be directed to the Register at the proper place. Publication of the testimony must be passed by the Court, or before the Chancellor or Register, or it may be done by consent of parties, in writing, entered on the back of the deposition or depositions, or otherwise. After publication passed, no testimony shall be taken, except by consent, or by special application to the Chancellor and allowance by him.

58. When testimony is published, the Register shall withdraw the same from the envelopes, and endorse the title of the cause, with the names of the witnesses, and by which party examined, upon the back of the depositions, and that the same was published by order of the Court, Chancellor,

or Register, or by consent of parties, and then file the same with the papers of the cause.

59. No order shall be necessary to prove exhibits *viva voce;* but where there is not a decree *pro confesso*, or the proof of exhibits, or notice waived, the opposite solicitor must be served with one day's notice before the hearing that such exhibits will be proved at the hearing. Other documentary testimony may be proved on like notice. The Court can put off the hearing, to give time to prove or rebut documentary testimony.

DOCKETS; CAPTION OF MINUTES; AND SPECIAL TERMS.

60. The Register of each Court shall prepare a docket for each term, of all the causes not finally disposed of at the previous term, and of the suits since commenced; in which shall be entered the name of each complainant and each defendant. This docket must be laid off with appropriate columns; one with the names of the solicitors and the number of the cause; one with the names of the parties; in another must be entered the time when each pleading was filed, and opposite to the names of the respective defendants the state of the cause as to such defendant; as thus; "Answer filed"; "Answer filed by guardian *ad litem*": "Decree *pro confesso* on personal service"; "Decree *pro confesso* on publication," as the case may be; and where the cause is not at issue as to any defendant, a vacant space must be left opposite the name of such defendant. In another column must be entered, in regular order as to time, a short note of the several orders and decrees made in the cause by the Court, Chancellor or Register; placing those made by the Court or Chancellor in one place, and those by the Register in another; with the note of the orders made by the Register, shall be noted the date of the issue and return of all summons, and other process, orders and rules. This docket will contain one other distinct column, left blank, for the entries of the Chancellor during the term.—The Register will file in the papers of each cause on the docket an exact copy of the docket of said cause and the entries thereon, for the use of the Chancellor; which paper is part of the record. The causes will be placed on the

docket in the order in which the original bills are filed; and the number placed on the bill when filed must not be changed, and all the papers of the cause must be so numbered.

61. The caption of the minutes of a regular term of the Court of Chancery must be in the following form, to-wit: "At a Court of Chancery held for the ——— District, composed of the County of ——— in the State of Alabama, at the court-house thereof in the town of ———, on the ——— Monday of ———, being the ——— day of said month, in the year of our Lord one thousand eight hundred and ———; present the Honorable ———, Chancellor of the ——— Chancery Division of said State," as the case may be; where the Court is held at a different place than the county site, or there are more counties in the district than one, the proper changes will be made.

62. When a special or extra term of a Court of Chancery is ordered by a Chancellor, he will transmit the order therefor to the Register, who must enter the same on the minute book of the Court immediately after the minutes of the previous term, file the order in his office, and have the same published as directed by the Chancellor, and certify to such Chancellor who is to hold said extra term that publication has been made in pursuance of said order. When a special or extra term is held, the caption of the minutes of the Court shall be so varied, as to show the time when the order therefor was made, and the length of time it was published as certified as above.

HEARING.

63. When a cause is called for hearing, if the complainant does not appear, it shall be dismissed; if he appears, and the defendant does not, it shall be heard, and decree rendered according to the claim and proof. Either party, on timely application, may set aside his default, on such terms as the Court may impose.

64. Applications for continuance for want of testimony, must be in writing, and conform to the rule in regard to the continuances of trials in the courts of law.

65. No application for a continuance for want of testimony must be considered, unless the equity of the bill is

admitted, until the question of equity is disposed of, by way of motion to dismiss for want of equity, or, if there is a demurrer to the bill, by decision on the demurrer.

66. All demurrers, whether contained in the answer or not, are to be disposed of on the calling of the cause, without waiting for the cause to be ready on the proof; but when the cause is ready for hearing on the pleadings and proofs, it must be heard, without waiting for a separate decision on a demurrer contained in the answer. This Rule must also apply where a plea is interposed, the truth of which is admitted.

67. All exceptions to bills, answers, reports, or testimony, whether coming before the Court in the first place for consideration, or by way of appeal or review, must be heard in connection with the equity of the bill, unless that question has been previously decided or admitted; also, if there is a demurrer undisposed of in the case, it must be considered by the Court at the same time with the exceptions.

68. A defendant may, at the calling of the cause, when he has not demurred for want of equity, move to dismiss a bill on that ground, unless a similar motion has been previously made, or the cause is ready for hearing on bill and answer or pleading and proofs.

69. The causes shall be heard in the order in which they are placed on the docket.

70. Before the hearing of the cause, the counsel on both sides must prepare a brief for the Court, of the points and authorities relied on. When any fact is referred to on the brief, it will be stated what witness proves the same. If either of the counsel fails to furnish such brief, the Court can decline to hear any argument on that side of the cause.

71. On the hearing of a cause, the Court can dispense with the reading of the pleadings and proofs; and in that case, the complainant's counsel must state the case made by the bill, and the defendant's counsel the defence made by the answer. The complainant's counsel must then offer his testimony in chief, naming the witnesses and other testimony, of which the Register must take a note; and then that of the defendant must be offered, and noted by the Register; to which the complainant, in like manner, must offer his rebut-

ting testimony. Any testimony not offered in this way, and noted by the Register on the minutes, must not be considered as any part of the record, nor be considered by the Chancellor. Counsel on either side, in the course of their arguments, can read any portion of the pleadings or proofs. A hearing on bill and answer, motion, demurrer, exceptions, or appeal, shall conform, as far as applicable, to this Rule.

72. The Register shall enter on the minutes of the Court a memorandum of the testimony offered by each party on the hearing of a cause, a copy of which shall be filed with the papers for the use of the Chancellor.

73. At the call for motions each morning, as hereafter directed, any cause can be submitted for decree without argument, unless objection is made; and when a cause is submitted for decree without argument, the testimony must be offered and noted as directed in the two foregoing Rules.

74. Before a decree shall be made on a bill purporting to be filed on behalf of an infant, an affidavit must be made by some disinterested person as to the fact of infancy.

DECREES AND ORDERS.

75. When a cause is submitted during term time for a decree or order, such decree shall be valid, if rendered during any vacation. When any decree or order is made by a Chancellor in vacation, it shall be the duty of the Register, as soon as the same is filed in his office, to enter the same at length on the minute book of the Court, immediately after the minutes of the previous term, and the same shall be considered as enrolled from and after such entry, which shall be dated; but if said decree be other than for the payment of money, no process for its execution shall issue thereon until the next ensuing term of the Court, unless the complainant, or his solicitor, shall have given to the defendant, or his solicitor, ten days' notice in writing of his or their intention to have execution of the decree, which notice shall be served by the sheriff, and filed with the Register as a paper in said cause. When the decree is rendered in vacation, either party may apply for a rehearing by the second day of the next ensuing term of said Court.

76. All decrees and orders made by the Court in term time, with the exception of their captions, shall be entered at

length on the minutes of the Court; the Chancellor's reasons, however, for such decree or order, shall not be entered. If an appeal should be taken, the Register shall not include in the transcript both the original order or decree on file and the entry on the minutes, nor shall they both be included in the final record.

77. A party desiring a rehearing of a decree must apply to the Chancellor at chambers, by petition, during the term in which the decree is rendered. The petition need not state any of the proceedings anterior to the decree sought to be reheard, but must state the special matter or cause on which the rehearing is applied for, and the principal points in which the decree is alleged to be erroneous; and the facts, if they do not appear from the records of the Court, must be verified by the affidavit of the party or some other person. The petition must be confined to the case made by the record. On this petition, the Chancellor must determine, without argument, whether the cause ought to be reheard, and, if he concludes to grant a rehearing, order accordingly; but if he declines to do so, no order must be made on said petition.

78. An order of reference, or to take and state an account, or make inquiry by the Register, or any other order preparatory of a cause, whether made by the Chancellor or Register in vacation, or by the Court, may, at any subsequent time before final decree, be opened, varied, or discharged on motion of either party, or the Court may, without motion, revoke any order previously made.

79. A final decree shall not be called in question, before the Court rendering it, after the adjournment of the term when rendered, except by bill of review, and shall never be impeached by original bill, unless on the ground of fraud.

APPEALS FROM THE DECISIONS OF THE CHANCELLOR.

80. When an appeal is taken from a decision of the Chancellor on any matter decided by him, the transcript sent to the Supreme Court must contain as well a copy of the opinion filed by the Chancellor, if any, as of the decree or order appealed from.

81. Any complainant or defendant, in a cause in which a decree or order final may have been rendered, may appeal to the

Supreme Court in the name of himself and all the other complainants or defendants to the decree.

82. The Chancellor shall, upon making any final or interlocutory decree which has the effect of dissolving an injunction, or discharging a *ne exeat* or attachment in chancery authorizing the seizure of property, prescribe the penalty and condition of the bond to be given by the appellant, should he thereafter appeal from such decree; and the appeal, in such cases, when taken before the Register, and the bond executed as prescribed by the Chancellor, and approved by the Register, shall operate to restore the injunction, *ne exeat*, or writ of seizure in the nature of an attachment, until the same shall be reviewed in the Supreme Court.

PROCEEDINGS BEFORE THE REGISTER AS MASTER.

83. The sessions of the Register as Master in Chancery shall be held at his office, unless the Chancellor or Court otherwise directs, or he himself appoints a different place by consent of parties.

84. All accounts taken by the Register shall be in the form of debtor and creditor, and the vouchers must be so numbered as to correspond with the numbers on the account. A reference, however, to ascertain the amount due from one party to another, where a statement of an account is not necessary, need not be in this form.

85. The Register shall not be required to give notice of the taking of an account to any defendant who has failed to answer the bill. Where a reference is executed during term time, one day's notice must be given to the parties entitled, unless waived, and, when executed in vacation, at least five days.

86. No notice to the parties to bring in objections to the draft of a report shall be necessary, nor can any exceptions be taken before the Register to such draft; nor shall any exceptions to a report be referred to the Register, but the same shall be heard and decided in the first instance by the Chancellor or Court.

87. Reports of the Register, read in open court on one day, may be confirmed the next, unless excepted to; and when that is the case, exceptions can be heard and determined without

further postponement. The Chancellor may extend the time for excepting to reports, and for hearing exceptions, to such day or days as he may deem proper; but a defendant against whom a decree *pro confesso* has been entered, and who has not appeared before the Register on the reference, shall not be allowed to except to the report, but, as to such defendant, the report shall be confirmed when read. Any defendant who failed to appear before the Register on the reference, or is otherwise in contempt, or who has not submitted to the jurisdiction of the Court, shall not be allowed to except to the report of the Register, but, as to such defendant, the same shall be confirmed when read. A defendant against whom a decree *pro confesso* is in force, and who appeared before the Register on a reference, may except to the report; and any defendant in contempt for want of an answer, may except to the report of the Register as to the sufficiency of an answer proposed to be filed by him.

PETITIONS AND MOTIONS.

88. Each morning of the term, after the first day, before the regular calls of the docket shall be commenced, motions shall be called for; when any motion or petition, not affecting the merits of a cause in court, but preparatory of the same for hearing, or in regard to other matters necessary to be brought before the Court, can be submitted; and at the calling of a cause any incidental motion can be submitted.

89. Motions to dissolve injunctions, when made in term time, must be submitted at the regular call of the docket; but if the cause is then ready for hearing on the merits, the Court must proceed with the hearing, without taking up the motion separately. When there is a demurrer for want of equity or other cause, and the motion to dissolve the injunction is made in term time, the demurrer must be heard in connection with the motion; but if there is no demurrer, or motion to dismiss, for want of equity, the equity of the bill must nevertheless be considered by the Court, and, if it wants equity, it must be dismissed; but no motion shall be made to dissolve an injunction on the denials of the answer, unless the answer has been filed at least twenty-four hours. When a motion is made to dissolve an injunction, and exceptions to the answer have been filed and remain undecided, they shall be decided by the Chancellor in

connection with the motion, without being in the first instance passed on by the Register.

90. All special motions and petitions, which are not, by the Practice of the Court, considered *ex parte*, must be made and heard upon one day's notice in writing, unless notice is waived.

INJUNCTIONS.

91. Where exceptions have been filed to an answer for insufficiency, and decided by the Chancellor to be not well taken, it shall be in his discretion to dissolve the injunction without motion or further argument.

92. Where a complainant in an injunction bill, takes no steps to bring in a defendant, before the second term after an injunction has been obtained, the same shall be dissolved of course.

93. All applications to reinstate injunctions, must be made, in the first instance, to the Chancellor who pronounced the order of dissolution, and, when made in vacation, must be on petition, setting forth the grounds of the application; the facts of which petition must be verified by affidavit. A copy of this petition must be served, with a notice of the time and place of the application, on the defendant or his solicitor, at least ten days before the hearing of such application, unless the Chancellor, for sufficient reasons set forth in the petition, dispenses with notice to the opposite party, and then it can be heard *ex parte* on presentation. If the application is refused, the complainant can appeal to a Judge of the Supreme Court, if that Court is not in session; but should it be in session, the appeal must be to that Court, and not to a Judge thereof.

ABATEMENT; REVIVOR; AND SUPPLEMENTAL BILLS.

94. No suit instituted by an unmarried woman, or in which she shall be complainant, shall abate by her intermarriage; but her husband may make himself a party on motion of course, at or before the second term after such intermarriage.

95. Upon a suit being abated by death, marriage, or otherwise, it shall not be necessary to file a bill of revivor; but the proper parties may be called in by an order, a copy of which shall be served, which order shall have the same force and effect

that a bill of revivor would have if filed. This order shall be obtained on verbal suggestion to the Register, Chancellor, or Court, without notice, and the suit stand revived after the time allowed to come in, as in case of the service of a summons on a bill of revivor.

96. In filing supplemental bills, bills of revivor, or bills of revivor and supplement, it shall not be necessary to recite any part of the original bill, nor any part of the subsequent proceedings; but in supplemental bills, it shall be sufficient to refer to the original bill, and state the new matter; and in bills of revivor, the cause requiring the revivor, with the appropriate prayer.

97. Summons on supplemental bills, bills of revivor, and bills of revivor and supplement, shall be returnable to a day certain, not less than thirty days from the time of its issue; and on its being executed thirty days, the Chancellor or Register in vacation, or the Chancellor in term time, may, if the supplemental matter be not answered, order the same to be taken *pro confesso*, subject to be set aside on filing a sufficient answer, or, if it be a bill of revivor, order the suit to stand revived, or, if the bill calls for an answer to the original bill, decree that the same be taken *pro confesso*, or direct proceedings to enforce an answer, by attachment or sequestration as directed in the foregoing Rules, either as to the original or supplemental matter. No summons, however, to revive, or to answer the original or supplemental matter, under this Rule, shall be returnable to a day beyond the first day of the next term; but, if thirty days do not intervene between the filing of the bill and the next term, the summons shall issue returnable to that term; and, if executed five days before its commencement, the decree *pro confesso*, or order to revive, or to enforce an answer, shall be then made, unless good cause be shown to the contrary.

98. Orders of publication against defendants who cannot be served, shall be made on supplemental bills, bills of revivor, or bills of revivor and supplement, as upon original bills; and after the expiration of the time required to answer or show cause, the supplemental matter may be taken *pro confesso*, or the suit revived, as to such defendant. Where the original bill has not been answered, service can be perfected under an order of publication on the supplemental

bill or bill of revivor, and an answer required, followed by a decree *pro confesso*.

99. An order to revive, when not resisted, shall be an order of course, and shall not affect the subsequent consideration of the question of the right to revive, or of the equity of the original bill. A defendant may voluntarily come in, and make himself a party, and consent to a revivor.

100. Suits or decrees may be revived for costs; and whenever any suit in Chancery is allowed to abate, in consequence of the death of any one or more of the parties, complainants or defendants, the Court of Chancery shall decree against the parties then alive such costs, to be taxed by the Register, as accrued at the instance of such living parties, and shall award a summons to the (legal) representatives of such party as may be dead, to show cause why the costs which had accrued against such deceased party shall not be decreed against such representative, to be levied of the estate of said decedent in his hands to be administered; and upon service of said summons, or return of two successive writs of summons "not found," and no sufficient cause being shown, the Court shall decree accordingly; but no decree can be rendered under this Rule against a representative, until eighteen months after the grant of letters, and, if the estate be reported insolvent, the decree shall be certified as judgments at law against such estate.

MORTGAGE SUITS.

101. In mortgage suits, it shall be sufficient, to bring in subsequent incumbrancers, to state that they claim some interest in the subject of the bill, and pray for a summons to them to answer; and the Court shall have power to decree a sale, and direct the proceeds to be brought into Court, without adjusting the priorities between such parties, unless there be some equity shown which makes it necessary; and any person, whether a party to the suit or otherwise, shall have the liberty to present his claim, by petition, to the Court, for the proceeds of the sale before distribution.

102. If it shall be discovered that there are subsequent incumbrancers, or parties in interest, not parties to the cause, at any time before confirmation of the sale in any mortgage

suit, the complainant or purchaser shall have liberty to bring them before the Court at that stage of the proceedings; and if they make no opposition by answer, their interest may be foreclosed without a re-sale of the property.

COSTS.

103. Upon the decision of any interlocutory motion or question, the Court or Chancellor may impose such portion of the costs of the suit upon either party as to the Chancellor may seem proper.

104. Whenever an execution out of Chancery for costs shall be returned "no property," in whole or in part, the Register may issue a summons to the party who was not decreed to pay costs, to show cause why he should not be decreed to pay such portion of the costs as were incurred at the instance of such party; and on the return of said summons "executed," or two consecutive summons "not found," and such party not showing sufficient cause to the contrary, the Court may decree that the party pay such portion of the costs as were incurred at his instance, or the Court may decree any part of the costs which accrued at the instance of such party to be paid by him.

RECEIVERS.

105. Where there are more suits than one in which a receiver is required, whether the suits be in the same or in different Courts or divisions, but one Receiver shall be appointed for the same property; and should the Receiver be appointed in a suit not entitled to priority, he shall hold the property, funds, and proceeds, subject to discharge the liens of the parties in their regular order of priority, and the Chancellor who may have appointed him shall so decree and have the same applied.

106. Where two or more bills are filed in different Courts or divisions, and a Receiver shall have been appointed in one of them, the complainants in the other suits, on producing a certified copy of the proceedings in their causes to the Court where the Receiver shall have been appointed, shall be entitled to an order that such Receiver hold the property, or the fund and proceeds, to be applied according to the prior liens of the several cases, without regard to

the first decree; and in such case, the creditors or complainants in the suits in which the Receiver was not appointed, if dissatisfied with the Receiver appointed in the other suit, may move the Court in which the Receiver was appointed for his removal and the appointment of another; and a sufficient cause being shown, the Court must remove him, and appoint some one else.

MISCELLANEOUS PROVISIONS.

107. Where a suit at law and a bill in Chancery are instituted for the same claim, the opposite party, on suggestion, supported by affidavit, may move the Court in term time, or the Chancellor in vacation, to inspect the records; and if it appear that the two suits are for one and the same cause of action, it shall be ordered that the plaintiff or claimant elect in which he will proceed, and that he dismiss the other.

108. On the hearing of all motions, appeals, and other applications, before the Chancellor in vacation, certified copies of such of the papers on file as will enable him to decide the matters submitted understandingly, shall be laid before him.

109. In all cases, where, by the English Orders or Practice, two days' notice is required, one day shall be deemed sufficient, unless the Chancellor shall otherwise direct.

110. In the computation of time under these Rules, in the giving of notice and the making of motions and other applications, the day on which the notice is given shall be included, and that on which the motion or other application is to be heard shall be excluded. Where one day's notice shall be required, the motion or application may be heard the next day after the notice is served.

111. These Rules shall take effect, and be of force, from and after the first day of November next; and when, and as soon as, they shall so take effect and be of force, the present Rules, heretofore adopted by this Court, for the regulation of the Practice in Chancery in this State, shall cease, and be of no further force or effect.

CERTIFICATE.

I hereby certify, that the foregoing Rules, numbered from one to one hundred and eleven inclusive, are a true and correct copy of the original Rules for the regulation of the Practice in Chancery in this State, now on file in my office, adopted by the Supreme Court of said State at June term, 1854.

Test. JOHN D. PHELAN,
Clerk of the Supreme Court of Alabama.

RULES FOR THE REGULATION

OF THE PRACTICE IN THE CIRCUIT COURT OF MOBILE COUNTY AND THE CITY COURT OF MOBILE; PREPARED BY THE JUDGES OF SAID COURTS PURSUANT TO THE THIRD SECTION OF THE ACT "TO REGULATE THE SESSIONS OF THE CIRCUIT AND CITY COURTS OF MOBILE," APPROVED FEBRUARY 17, 1854; APPROVED AND ADOPTED BY THE SUPREME COURT AT ITS JUNE TERM, 1854, AND DECLARED TO BE IN FORCE FROM AND AFTER THE 8TH DAY OF JUNE, 1854.

RULE I.

In the City Court, the first Mondays in November, December, January, February, March, April, May, and June, shall be return days for original and mesne process.

RULE II.

In the Circuit Court, the third Mondays after the fourth Mondays in March and October, and the first Mondays in December, January, February, May, and June, shall be return days for original and mesne process.

RULE III.

The first Monday in each month in the year shall be return day for final process in either Court; and in the absence of instructions by the party suing out such process, it shall be made returnable to the most distant return day within one hundred and thirty days of its issue.

RULE IV.

Upon the return of a summons not served as to any of the defendants, the Clerk, in the absence of instructions to the contrary by the party suing out the summons, shall issue an *alias* summons, returnable as an original summons, and so on until service is perfected.

RULE V.

The Clerk of the City Court shall keep for that Court two

dockets of civil and criminal cases; one for the Judge, and one for himself and the Bar. The Clerk of the Circuit Court shall keep such dockets as are required by the general law.

RULE VI.

The counsel for the plaintiff does not forfeit his right to conclude by waiving the opening argument, but must confine himself to a reply.

RULE VII.

Reasons in arrest of judgment, and reasons for new trials, and affidavits in support thereof, if any are relied on, shall be filed with the Clerk, and notice thereof given to the adverse party, one day before the argument; if the cause is tried on the last day of the term, the notice shall be given when the motion is entered. The party making such motion is entitled to the opening and conclusion of the argument. All such motions, not acted on within twenty days after trial, or continued by order of the Court, are to be considered discharged of course at the end of twenty days, or at the end of the term, if that should take place before the expiration of the twenty days.

RULE VIII.

The Clerk, under the directions of the Judge, shall set stated days for the hearing of motions, reasons for new trials, or in arrest of judgment, arguments on demurrers, and the settlement of pleadings, and such other business of the Court as may be disposed of without a jury.

RULE IX.

In the absence of orders to the contrary by the Judge, jury trials shall be had during alternate weeks, and they shall be so arranged that the same week shall not be the week for jury trials in both Courts, unless the business of the Courts requires it.

RULE X.

In the Circuit Court, the third Mondays after the fourth Mondays of March and October, and the first Mondays of

December, January, February, May, and June, shall be return days for admiralty process; and in the City Court the return days for such process shall be first and third Mondays of each month of the year.

RULE XI.

The Rules of Practice in Admiralty, as established by the Supreme Court of the United States, so far as they are not repugnant to the laws of Alabama, are hereby adopted.

RULE XII.

No bill of exceptions can be signed after the expiration of twenty days from the rendition of judgment, unless by consent of counsel in writing, and then it may be signed within ten days thereafter.

RULE XIII.

The "Rules of Practice in Circuit and County Courts," numbered 4, 9, 15, 17, 19, 21, 22, and 23, in the appendix to the Code, are declared to be inapplicable to the Circuit and City Courts of Mobile County. All other Rules adopted by the Supreme Court of Alabama for the Circuit Courts, and now in force, are hereby adopted for the Circuit and City Courts of Mobile County, so far as they are not repugnant to these Rules, and can be applied to the said Courts of Mobile County.

CERTIFICATE.

I hereby certify, that the foregoing Rules, numbered from one to thirteen inclusive, are a correct copy of the "Rules for the regulation of the Practice in the Circuit Court of Mobile County and the City Court of Mobile," adopted by the Supreme Court on the 8th day of June, 1854, and declared to be in force from and after that day.

Test. JOHN D. PHELAN,

Clerk of the Supreme Court of Alabama.

REPORTS

OF

CASES ARGUED AND DETERMINED

At June Term, 1853.

NELSON *vs.* IVERSON.

1. When one party has adduced in evidence a part of a conversation, the other has the right to call for the whole of it.
2. In laying the predicate to impeach a witness, his attention having been directed to a conversation had by him twenty years before, "in the *spring* of the year," person and place being specified, evidence of contradictory statements made by him in *February* of that year, in a conversation otherwise corresponding with that laid, is admissible; the rule only requires that his attention should be directed with *reasonable certainty* to the time, place and person involved in the supposed contradiction.
3. In detinue for a slave, plaintiff claimed under a parol gift from his maternal uncle, and the character of his mother's possession (whether she held as guardian for her infant son, or under a loan as a nurse to herself) was disputed: *Held*, that her declaration, while in possession, that the slave belonged to her brother, was admissible evidence against the plaintiff
4. In such case, evidence that plaintiff's grantor "was in the habit of controlling the slave" while in possession of plaintiff's mother, is also admissible.
6. But evidence that the grantor "usually supplied her (plaintiff's mother) with a nurse, and when one became too large for that purpose, he would take it away and supply another," is not, of itself, admissible.

5 and 8. The declaration of a person while in possession of a slave, "that she was his, and he intended to keep her," is admissible evidence as explanatory of his possession; but a declaration not connected with possession, is not admissible.

7. When the situation of a witness is such, that if a certain fact had existed

he would probably have known it, his want of knowledge is some evidence, though slight, that it did not exist; and in such case, he will be allowed to state, that if the fact existed he did not know it.

9. When detinue is brought against a bailee of a slave, his bailor is not a competent witness for him without a release; and the fact that the slave was hired for his victuals and clothes only, does not affect the principle.

10 and 11. Ownership is a fact to which a witness may testify.

12. When a deposition shows on its face that the commissioner by whom it was taken was not very expert in such matters, the court will look to this circumstance in gathering the meaning of the witness from the inapt expressions used

13. The objection that an answer is not responsive to the interrogatory, comes too late at the trial.

14. An infant is *in esse*, for the purpose of taking an estate for its benefit, from the time of conception, provided it be born alive and after such a period of fœtal existence that its continuance in life may be reasonably expected.

ERROR to the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

DETINUE by James R. Nelson against William Iverson, for the recovery of two slaves, which plaintiff claimed under a parol gift from his maternal uncle, Garland Dawkins. The principal facts of the case may be found in the previous reports of it in 17 Ala. 222, and 19 *ib.* 95. The additional facts necessary to an understanding of it as now presented, appear in the opinion.

RICE & MORGAN, for plaintiff in error:

1. An infant is *in esse*, for the purpose of taking an estate which is for its benefit, from the time of conception, provided it be born alive, and after such a period of fœtal existence that its continuance might be reasonably expected.—Harper *et ux.* v. Archer *et al.*, 4 Sm. & Mar. 99; Morrow v. Scott, 7 Georgia 535; Bishop's Heirs v. Hampton, 11 Ala. 254; 1 Black. Com. (Chitty's Ed. 1848) 130, note 13; 2 *ib.* 169, note 13; 2 Williams on Executors 1284.

2. The delivery of a slave to a third person, as a gift for an infant, is the consummation of the gift: the fact that the infant is in *ventre sa mere*, makes no difference in the principle. The delivery is good, because of the infant's presumed assent, not from any actual assent; and so long as the infancy continues,

the law presumes the infant's continuing assent.—Tate v. Tate, 1 Dev. & Bat. Eq. R. 22, 25. As the evidence in this case showed a delivery to plaintiff's mother, for him, about four months before his birth, it was erroneous to charge the jury that, in order to consummate the gift, under such circumstances, there must have been a delivery after his birth.—Nelson v. Iverson, 19 Ala. 99.

3. The declaration of Garland Dawkins, in relation to a negro woman and four children, not involved in this suit, "that he had sold them for $1,800," was wholly irrelevant and inadmissible.

4. There was error in admitting Mrs. Nelson's declaration, made to Reuben Dawkins in *February*, 1830. Her attention was not called to that time, but to "the *spring* of 1830."

5. It was palpable error to allow the defendant to prove by Reuben Dawkins, "that, whilst Judy was in possession of Martha Nelson, he had frequently heard her say that she belonged to Garland Dawkins." She held possession as guardian or bailee for her infant son; and she thus held possession in Georgia. The record does not show that the statute of limitations of Georgia was in evidence, or relied on by plaintiff. The statute could not possibly have any bearing on the case, as shown in the present record. And as Mrs. Nelson held as guardian or bailee for her infant son, "it is clear that no declaration of hers could be received in evidence to defeat his rights."—Nelson v. Iverson, 19 Ala. 99; Easley v. Dye, 14 Ala. 158.

6. It was erroneous to allow Reuben Dawkins to testify "that Garland Dawkins was in the habit of controlling Judy whilst she was at Mrs. Nelson's." This might have been admissible, if plaintiff had relied on the statute of limitations of Georgia, and Mrs. Nelson's possession in Georgia. But the record does not show this, and the case differs in this respect from the case as presented when it was last here. It is well settled, that acts and declarations of neither the donor nor guardian, subsequent to the consummation of the gift by delivery, can prejudice or impair the donee's title; and therefore it was error to admit evidence that the donor controlled the slave "whilst she was at Mrs. Nelson's," which was after her delivery to her for her infant son.—Powell v. Olds, 9 Ala. 861.

7. Upon the same principle, it was erroneous to allow defendant to prove that, after Garland had re-taken possession of the girl, "he stated that she was his negro, and that he intended to keep her." This declaration was made after the consummation of the gift by delivery, and while plaintiff was still an infant. Even if Garland's possession "between 1830 and 1838" was adverse, and he did make such declarations, plaintiff could not be affected by such adverse possesssion or declarations, because he was an infant until 1844. The suit was brought in 1848, and therefore no question of the statute of limitations or adverse possession could be raised by defendant; and plaintiff did not rely on any such title, but solely on the gift to him, and delivery to his mother for him, in 1823.

8. It was erroneous to allow Mrs. Edge to testify that "Mr. Dawkins usually supplied Mrs. Nelson with a nurse; when one became too large for that purpose, he would take it away and supply another;" also, "If Judy was ever out of his possession, except occasionally as a nurse, it is more than I know." Each portion of this evidence was duly objected to, and should have been excluded.—Olds v. Powell, 7 Ala. 655, 656. A part of this evidence was an attempt to prove what was Garland Dawkins' intention, and this is against law.—Whetstone v. Bank, 9 Ala. 875, 886.

9. Inasmuch as the court allowed the defendant to prove Mrs. Nelson's declarations, to the effect that Garland Dawkins had not given Judy to plaintiff, plaintiff ought to have been allowed to prove her counter declarations, as given in Mrs. Edge's answer to the sixth cross interrogatory. Illegal evidence may be rebutted by illegal evidence. But if her declarations were legal evidence for defendant, why are they not legal evidence for plaintiff?

10. Phebe Webb was an incompetent witness for the defendant below. She was the widow of the donor, and the bailor of the defendant, who is her son-in-law. A recovery against a bailee, the bailor having notice of the suit, is evidence against the bailor.—Hare v. Fuller, 7 Ala. 718; Barney v. Dewey, 13 Johns. 224; 9 Bacon's Abr. 457.

11. A witness ought not to be permitted to testify that a third person "owned" a slave, nor that he himself "owned" him.

12. The testimony of Mrs. Lawless, to which plaintiff objected, refers to a period of time anterior to the gift to plaintiff, and it was therefore irrelevant. It was also erroneous to allow her to swear that Judy was loaned to Mrs. Nelson "as a nurse"; this was allowing her to swear as to Garland's intention.—Whetstone v. Bank, 9 Ala. 875, 886.

13. Those portions of the testimony of Davenport and wife, to which objection was taken, are obnoxious to all the objections made to the testimony of Mrs. Lawless, and to two additional objections: they were not responsive to the interrogatories, and they were not matters within the knowledge of the witnesses; their own deposition shows that they swore to these matters "because he (Garland Dawkins) told us so."

George W. Gunn, *contra:*

The material question in the case is presented by the charge of the court. The language used does not indicate a present intention or positive promise to give, but effectually excludes a present gift. There was no renunciation by the donor: he does not appear to have parted with his dominion over the slave: the *locus penitentiæ* still remained.—2 Ala. 117; Phillips v. McGrew, 13 *ib.* 259; Pearson v. Pearson, 7 Johns. 25; 2 Black. Com. 441, 442; 1 S. & M. 428.

A direct and immediate gift of personalty cannot be made to a person not *in esse.*—Halstead v. Thomas, 3 Strob. 101. To render a parol gift valid, there must be a thing in being, at the time it is made, upon which the gift could act, accompanied with actual delivery, as such gifts have no reference to the future, but go into immediate and absolute effect.—1 Ashmead's R. 87; 2 Vesey 431; 2 Saund. 47; Jones v. Dyer and Wife, 16 Ala. 224; Bryant v. Ingram, *ib.* 121; 3 Litt. 280; 2 Ala. 117; 1 *ib.* 52. And the possession must accompany the gift.—5 Eng. 211; 5 Gill & J. 461, 449. Neither can there be a reservation or condition to a parol gift, to take effect in future.—1 Ashm. 88; 2 Gratt. 344; 1 Edw. 296. To constitute an effectual delivery, the donor must part with the dominion of the thing, in favor of the donee; a bare intention to give is insufficient.—16 Ala. 121; *ib.* 224; 13 *ib.* 255; 10 Johns. 293; Riley 290.

In all cases of gifts *inter vivos*, there is a *locus penitentiæ*,

until the intention and act are consummated by delivery.—18 Johns. 145; 9 East 49; 1 Madd. 176. And in gifts *causa mortis*, there must also be an actual delivery, which may be made to a third person for the use of the donee, if that person retains the possession until the donor's death.—3 Shep. 429; 16 Vermont 206; 1 Murph. 127; 1 Nott & McCord 237; 10 Conn. 480; 2 Wheat. 17; 2 Ala. 669; 20 Verm. 595. If, then, there was only an imperfect gift in 1823, and no delivery afterwards, the title to the slave was not divested out of the supposed donor.—Thomas v. DeGraffenreid, 17 Ala. 610; 9 *ib.* 391; 15 *ib.* 91; 7 Leigh 317; 2 Iredell 361.

The declarations of the alleged donor were admissible evidence.—Harper's R. 374; 1 Bailey 119; 12 Johns. 188; 1 Stew. & P. 56; 9 Ala. 206; 17 *ib.* 207.

The declarations of Mrs. Nelson were likewise admissible.—17 Ala. 207; 14 *ib.* 681.

When a witness' relations to a family are such that he would, in all probability, have known of the existence of a fact, ostensible and notorious in its character, his want of all knowledge on the subject may be received as some evidence of its non-existence.—17 Ala. 607; 3 Stark. Ev. 516.

Phebe Webb was not an incompetent witness. She had no such interest as would disqualify her.—1 Phil. Ev. 51; 2 Watts & Serg. 190: 9 Dana 43; 8 Shep. 450; 2 McLean 422; 4 Shep. 117; 9 Ala. 869; 3 Kelly 277; 8 Barr 442; 8 B. Mon. 435; Story on Bailments § 105; 4 Denio 515; 13 Ala. 821; 8 Blackf. 45.

CHILTON, C. J.—1. The plaintiff having offered evidence of what Garland Dawkins said to Reuben Dawkins, in regard to the division of the estate of his father, the defendant was allowed, against the plaintiff's objection, to prove that in the same conversation he stated, that the four negro slaves belonging to it had been sold for $1,800 by him. This evidence tended to throw light upon the value of the estate in the hands of Garland, and if any portion of the conversation was relevant, we think the whole of it, had at the same time and relating to the same subject-matter, was competent proof; otherwise, the truth might be suppressed, or perverted by garbled statements, which the law does not allow. If it was irrelevant, it was

rebutting irrelevant testimony of the plaintiff, and consequently he cannot complain.

2. As a predicate for impeaching the testimony of Mrs. Martha Nelson, the defendant's counsel propounded to her the following interrogatory: "Did you not, in a certain conversation with Reuben Dawkins, at his house, in the spring of 1830, speaking of Garland's promise to give Judy to plaintiff, say that Garland Dawkins had promised to give Judy to a boy, if you had one, but that he had not done so; or did you not say that he, Garland, spoke only in jest when he made the promise, and that you knew it at the time, or something to that purport, and what? And did you not, in a similar conversation, at the house of your mother, in the spring of 1830, make the same statement?" To this interrogatory the witness answered that she did not. The defendant was then allowed to prove by Reuben Dawkins, that Mrs. Nelson, in a conversation had with him, in *February*, 1830, at his house, said that Garland Dawkins had promised to give Judy to a boy, if she had one, but that he had not done so, and that he was jesting. This proof was objected to.

It is insisted by the counsel for the plaintiff, that the inquiry in the predicate was confined to the *spring* of 1830, and the proof to show the contradiction dates the declarations as in *February* of that year; hence he concludes that the evidence proves no contradiction. The rule requires that the attention of the witness, who is attempted to be discredited, should be called to the time, place and person involved in the supposed contradiction, in order that the faculties of the mind may be put in motion, and the memory aided by the train of ideas which such circumstances would be likely to suggest with reference to the subject-matter of inquiry.—4 Phil. Ev. 761.

The rule, however, is satisfied, when the attention of the witness is called with reasonable certainty to the subject of the previous declarations. The precise words need not be repeated, and in many cases the precise time could not well be stated; and yet the witness might be as fully guarded against imposition as if the *exact* language and time had been given. Giving to the rule a practical, common sense interpretation, we do not entertain a doubt that it has been substantially complied with in the case before us. The declaration, the person to whom, and

the place at which it was made, are particularly given, and they are stated to have been made in the spring of 1830; whereas the contradicting witness says, the conversation took place in February—it may have been the day before the spring set in. Now it is most improbable that Mrs. Nelson, in reference to a conversation which occurred some twenty years before, should have answered under the apprehension that the particular season in which it was said to have occurred, was an essential element in the inquiry. To suppose that, with a recollection of the conversation, she was shielding herself under the *letter* of the inquiry as to time, disregarding the other concurrent circumstances of place, person and subject matter, all which pointed her to the true answer, would tend more strongly to discredit her testimony than the proven contradiction; for, as to the latter, she may have forgotten, or the discrediting witness himself may be mistaken, while under the former hypothesis, her testimony would amount to an artful evasion of the true answer. We think the proof was properly admitted.

3. The fact as to whether Mrs. Nelson held the girl Judy, who is the mother of the slaves sued for, as natural guardian or trustee for the plaintiff, then an infant, or on a loan as a nurse, from her brother, Garland Dawkins, was disputed, and her declaration while in possession of the girl, that the slave belonged to Garland, was competent, as constituting part of the *res gestæ*, being connected with and explanatory of her possession. If she held as guardian or trustee, then, as was previously decided in this case, it is clear her declarations would not be evidence against her ward or *cestui que trust*, and no question of adverse possession would arise.

4. It was objected to the proof, that Garland Dawkins was in the habit of controlling the slave while in Mrs. Nelson's possession. This tended to show that he had not disposed of her, and was competent.

5. The proof that while Garland was in possession of the girl, between the year 1830 and 1838, (the period of his death,) he stated that he was the owner of her and intended to keep her, was legitimate, upon the same principle that Mrs. Nelson's declarations were received, namely, as explanatory of his possession, and showing that he held in his own right, and not in right of another.

6. The proof made by Mrs. Edge, "that Mr. Dawkins usually supplied Mrs. Nelson with a nurse, and when one would bec me too large for that purpose, he would take it away and supply another," was improperly admitted, as it has no connection with the girl Judy. That he sent other negroes as a nurse, does not prove that this one was so sent.

7. It appears that Mrs. Edge was on terms of intimacy with the parties, Garland Dawkins and his sister, Mrs. Nelson; that she lived in a quarter of a mile of the former, and a mile and a quarter of the latter; and she was allowed to say, "If Garland Dawkins was ever out of possession of the girl Judy, except occasionally as a nurse, it is more than I know." This was objected to by the plaintiff, but the objection was overruled.

Our opinion is, that although the proof is of a negative character, yet, under the circumstances, it was legal. The relation of the witness to the family of Dawkins and Mrs. Nelson, was such, that had the property and possession of the girl Judy been transferred to the latter, she would probably have known it, and the fact that she did not know it, although weak, is nevertheless some evidence tending to show that it did not exist.—17 Ala. 602.

8. Mrs. Edge was asked by the plaintiff, on cross examination, whether she had not heard Mrs. Nelson say, that the girl Judy was given by Dawkins to James R. Nelson, and whether, at the time of the conversation, Mrs. Nelson had the possession of the girl. The witness, answering the question, says, she heard Mrs. Nelson say, about sixteen years ago, that Garland had given Judy to James R. Nelson, but she does not state that Mrs. Nelson then had the slave in her possession. As the declaration was not connected with the possession, it is well settled that it was not properly admissible as evidence, and the court properly excluded it.

9. Phebe Webb was examined by the defendant, but an objection was duly made, on the part of the plaintiff, to her competency, on the ground of interest. It appears that she had hired the slaves to the defendant to work for their victuals and clothes, and while he thus possessed them, this action was commenced. She was examined to prove her title, to legalize his possession; and, as in the contract of hiring there is an implied warranty that the thing hired belongs to the hirer, she

would, upon a failure of title in a suit against her bailee, having due notice thereof, be liable over to him for the damages he should have to pay by way of hire. That he gave the negroes only their victuals and clothes for the hire, does not affect the principle. This, though small, was a valuable consideration, and entitles the defendant to occupy the relation of a purchaser of the slaves for the term for which they were hired. We would observe, that this is such interest as the defendant may release, after which he may re-examine the witness.

10. Said witness stated that her first husband possessed, owned and controlled said slave ever since she was acquainted with her. The plaintiff moved to reject the word "owned" from the deposition, but the court refused to do so. We see no valid ground of objection to the proof. Ownership is a fact, and if the witness knew it, we know of no rule of law which forbids her deposing to it.

11. The same may be said with respect to that portion of the deposition of Mrs. Webb, in which she states, "After the death of Mr. Dawkins, I became owner, and I owned said negroes until I sold Judy to Mr. Thomas, in Alabama." This proof certainly has a material bearing upon the issue, which is the title to the slaves; and if the plaintiff had conceded the witness' competency to testify, it was neither "illegal, irrelevant, nor improper," as stated in the objection to it.

12. John Davenport and his wife, Elizabeth, were examined on interrogatories and cross interrogatories propounded by the parties. They deposed that they were acquainted with the slave Judy sometime about 1818 or 1820, and that she was in Garland Dawkins' possession when they first and last knew her, "only to loan as before stated." In answer to a previous interrogatory, they had stated that Garland had told them he had loaned the girl to his sister, Mrs. Nelson, as an act of kindness, as he was willing to assist her; but this latter answer was excluded by the court. They further stated that they knew the girl in possession of Mrs. Nelson, "for she was sent there as a loan, to nurse"; and in answer to the concluding interrogatory, requiring them to state every fact and circumstance tending to show that Garland never gave the slave to the plaintiff, they reply, "because he (the said Garland Dawkins) told us so."

The plaintiff moved the court to exclude from their testimony above stated, the words, "only to loan her, as we before stated"; this the court refused. Plaintiff also moved to strike out the clause, "for she was sent there as a loan, to nurse"; which motion was denied.

The commissioner who took this deposition evidently was not very expert in such matters, as the same is very inartificially written down and expressed, and some regard must be had to this consideration, since, by subjecting such depositions to very rigid rules of criticism, the ends of justice would very often be defeated. We must gather the meaning of the witnesses as well as we may, from the inapt expressions often used by the commissioners to express it. It was supposed, by the counsel, that the answer to the last general interrogatory is so connected with the answers to the fourth and fifth, as to render the latter but hearsay; but we do not think this a fair construction of it. These witnesses lived for seventeen years near neighbors to the parties, and it would not be improbable that they should have had personal knowledge of the facts to which they deposed. At all events, we do not feel warranted in so construing the last answer as to make it relate back to the previous answers, and render them but hearsay. To exclude them, the plaintiff should have examined as to the witnesses' means of knowledge, and not have left the matter doubtful; for, in case of doubt, it were better that the jury should have the proof than that it should be excluded.

13. As to the objection to that portion of Davenport's answer to the first cross interrogatory, which says, "the girl Judy went backwards and forwards from Garland Dawkins to Mrs. Nelson, and from Mrs. N. to Dawkins," we need only say that the objection, being based upon the ground that it is not responsive to the question, comes too late upon the trial. It should have been made earlier;—but it was not tenable upon the merits; for the question inquires for the length of time the girl was in Mrs. Nelson's possession, and when she was taken back into Dawkins' possession.

14. After setting out all the proof, and some additional exceptions to it, which we do not deem of sufficient moment to require a special notice, the bill of exceptions states that the court charged the jury, "that, if they believed from the evi-

dence that the declarations of the alleged donor to his sister, constituting the alleged gift, were, if she would have a boy child he would give it a negro, that this amounted only to an intention to give upon the birth of a boy child, and taken separately would not amount to a gift; and that in order to consummate a gift, under such circumstances, a delivery should have been made after the birth of the child."

There was proof tending to show that Garland Dawkins, some few months before the birth of the plaintiff, delivered the mother of the slaves sued for to Mrs. Nelson, the mother of the plaintiff, for him; that is, as we understand Mrs. Nelson's proof, the gift was made, and the property was delivered to her to belong to her child, with which she was then pregnant, should it be a boy.

It seems now to be the settled law, that an infant is *in esse* from the time of its conception, for the purpose of taking any estate for its benefit, provided it be afterwards born alive, and after such a period of fœtal existence that its continuance in life might be reasonably expected.—Harper *et ux.* v. Archer, 4 Sm. & M. 109, and cases there cited. Such being the rule of law, if an actual delivery of the slave was made to the mother while she was pregnant with the plaintiff, as a consummated gift to her child in the event it should be a boy, this would vest in him an inchoate right, which would become perfected at his birth, without any further or other delivery. The mother would hold in trust for him.

It is not our province to decide whether the facts proved show that a gift was perfected before the plaintiff's birth. This is a matter for the jury, as the evidence is conflicting. It is sufficient that there was some evidence tending to show that fact, and this was virtually withdrawn from the jury by the charge, which assumed that, although there may have been a delivery in June, before the plaintiff's birth in October, 1823, yet such delivery for him could not render the gift perfect, as in the opinion of the court it required a delivery *after* his birth in order to consummate the gift. In this the judge mistook the law, and for this and the other noticed errors, the cause must be remanded.

Judgment reversed, and cause remanded.

COOK & SCOTT *vs.* PARHAM.

1. In an action against the owners of a steamboat to recover damages for the loss of a slave, who was hired as a deck hand on the boat, and was killed in consequence of a collision with another boat occasioned by the negligence and want of skill of the former's officers, one of the part-owners acting as captain at the time of the collision, evidence of his general reputation as a steamboat captain is admissible, as tending to prove notice of his incompetency to the defendants.
2. In such an action, a witness for plaintiff was asked "what was the general reputation of said defendant as a steamboat captain," and answered that he had no reputation, for the reason that he had no experience, and that he regarded him as wholly incompetent for such a duty:" *Held*, that the question and answer were admissible.
3. When evidence is offered and admitted for a purpose for which it is inadmissible, its admission is not an error which will reverse, if the record also shows that it was admissible for another purpose; if the opposite party wishes to limit its effect, he must do so by requesting instructions to the jury.
4. A person acquainted with the navigation of the river, and a witness of the collision, may give his opinion as an expert whether the particular act which occasioned it was an act of prudence and discretion on the part of the officers.
5. The owners of the boat would be responsible for the loss of the slave, if his death was the legitimate and natural consequence of the collision, and the collision was caused by the negligence of the defendants; and if his death was occasioned by his own act in leaping into the river, when frightened out of his ordinary presence of mind by the excitement, confusion and danger caused by the collision, it would be the legitimate consequence of that collision.
6. It is the duty of the owners to use due care in providing competent officers for the boat, and the bailor may hold them responsible for the neglect of this duty, although he had the means of knowing the officers' characters for care and skill when he hired his slave to them.
7. Where two persons are employed in the same general business by a common employer, if one is injured by the negligence of the other, the employer is not responsible (*per tot. cur.;*) but whether this rule applies to owners of a steamboat, when sued for the loss of a slave who was hired as a deck hand on the boat, and whose death was caused by a collision occasioned by the carelessness of the captain, who was one of the owners, *quære?* (Chief Justice Chilton and Justice Ligon holding the negative, and Justices Goldthwaite and Phelan the affirmative.)
8. If the collision was caused by the negligence or fault of the pilot, and the owners had the means of knowing that he was careless and reckless, they are responsible for the injury.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

PARHAM brought an action on the case against the plaintiffs in error, as co-partners and owners of the steamboat Wm. R. King, for the value of a slave named June, who was hired as a deck hand on the boat, and who, it was alleged, came to his death by the negligence of the defendants. It appears from the record, that on the night of the 5th Feb., 1847, a collision took place between the Wm. R. King and another steamboat, called Winona, a short distance below Beckley's Landing on the Tombeckbee River, by which the former was so much damaged that, after some ineffectual efforts to stop the leak, she was run up to the said landing, and there run ashore, where she sank by the stern, her bows resting on the bank; about fifteen minutes elapsed between the collision and her sinking. Soon after the collision, the slave June, with some other hands, was ordered aft to launch the yawl, which was aft on the lower deck; one of these hands was afterwards found drowned in the yawl, and June was also found drowned a little below the stern of the boat. There was evidence conducing to show, that after the bows of the boat had reached the bank, and when there was full opportunity for all persons on the boat in front of the wheel-house, having ordinary prudence or presence of mind, to reach the shore, June unnecessarily jumped overboard into the river, from a part of the boat in front of the wheel-house, and was drowned; that much excitement, confusion and alarm prevailed on board of the boat after the collision, and that the slave who jumped overboard, supposed to be June, seemed to be "confused and frightened" at the time.

Major Cook, who was one of the owners of the boat, was acting as captain at the time of the collision, and was on the hurricane deck in command of the boat when it took place. There was evidence tending to show that he was incompetent for that station, by reason of his want of skill and experience, and that the collision took place in consequence of his want of skill; and that the pilot of the boat was also an incompetent man for his station, by reason of his reckless character. There was, however, conflicting evidence on all these points.—The evidence also showed that, on our river steamboats, the

pilot is subject to the orders of the captain, and steers by his directions; and that slaves hire for greater wages as deck hands on steamboats, than elsewhere, in consequence of the nature of the service. To show that the collision took place in consequence of the negligence of the officers of the Wm. R. King, the plaintiff introduced a witness (Mr. Charles) who was well acquainted with the customs and usages of the river, from a service of nine years on steamboats, and who was the clerk of the Winona at the time of the collision, and saw what occurred. Plaintiff asked this witness, "Was the act of the King, in turning across the river when and where she did, that of prudence and discretion?" The defendants objected to this question, but their objection was overruled. The witness answered: "The act of the King, in turning across at that time and place, was not one of prudence, but of gross carelessness and mismanagement." Defendants also objected to this answer, but their objection was overruled, and they excepted.

Plaintiff also asked one of his witnesses, "What is the general reputation of said Cook as a steamboat captain;" to which question, before the taking of the deposition, the defendants objected. The witness answered, "Cook had no reputation, for the reason that he had no experience, and he regarded him as wholly incompetent for such a duty." The court allowed the answer to be read in evidence.

The court charged the jury as follows:

That before they could find for the plaintiff, they must be satisfied from the evidence that the collision was occasioned by the carelessness or want of skill of the officers of the King, and that the death of the negro was the legitimate and natural consequence of the collision, as contra-distinguished from the inevitable consequence thereof; that even if the negro had an opportunity of escaping, by the use of ordinary care and presence of mind, yet, if he lost his presence of mind from fright, and so jumped overboard, and this fright and loss of presence of mind were occasioned by the carelessness or negligence of the officers of the boat, the defendants would still be liable to plaintiff for his death.

That, as a general principle, it was true that where two persons are employed by a common employer about the same general business, and one of them is injured by the negligence of the other,

the common employer is not responsible for that injury; yet this principle was not applicable to the present case, for two reasons: 1st, if the injury arose from the carelessness or incompetency of Cook as captain, since he was also one of the owners, he and his co-owners were responsible; 2d, if the collision occurred from the negligence of the pilot, then the further question arises, Did the owners exercise due and proper care and diligence in the employment of him as pilot? and if they did exercise such proper care and diligence in employing him, then they are not liable; but if, on the other hand, they employed him as a pilot, knowing him to be careless and reckless, or having the means of knowing that such was his character, then they are liable.

That in hiring hands to work on a steamboat, there was an implied contract, on the part of the owners, that they will use proper care and diligence that the captain, pilot and other officers employed in navigating the boat, shall be competent to discharge their respective duties.

The defendants excepted to these several charges, and requested the court to instruct the jury as follows:

1. That, if the said slave and the pilot were both hired by the defendants, and employed on the same boat, and if the loss of the slave occurred from the negligence or misconduct of the said pilot in navigating the boat, defendants are not liable in this action.

2. That, if they found that the plaintiff, at the time of hiring, knew, or had the means of knowing, who was the captain and who the pilot of said boat, and their skill and capacity, and that the loss occurred from the want of skill or capacity of the captain or pilot, then plaintiff cannot recover.

The court refused these charges, and the defendants excepted.

The several rulings of the court on the evidence, the charges given, and the refusal to charge as requested, are now assigned for error.

Wm. G. Jones, for plaintiffs in error:

"If a servant, by his negligence while actually employed in his master's business, does any damage to a stranger, the master shall answer for his neglect."—1 Bl. Com. 431. This principle has been established for centuries, and the books are full of cases showing its application. No case, however, can be

found in England prior to the year 1837, in which it was even attempted to make the master responsible to one of his servants for an injury resulting from the negligence or unskillfulness of a fellow servant employed by the same master in the same general business. The entire absence of any such case, for so long a time, during which such injuries must frequently have happened, is persuasive, almost conclusive evidence, that the master is not responsible to his servant in such cases. The first attempt to establish such a liability, was in the case of Priestly v. Fowler, 3 M. & W. 1, decided in the Court of Exchequer in 1837. It was admitted by the eminent counsel who argued that case, and the more eminent judge who decided it, that it was without precedent. Not a single authority was cited, either in the argument or judgment. It was argued and decided entirely on principle. The decision was, that the master is not responsible to his servant for an injury done him by the negligence or unskillfulness of a fellow servant employed in the same general business. This decision has been since followed and confirmed in England, by the case of Winterbottom v. Wright, 10 M &. W. 109, and the recent cases of Hutchinson v. The York, Newcastle & Berwick Railway Co., and Wigmore v. Jay, reported in the Monthly Law Reporter for December, 1850, p. 379-94. In 1838, the case of Murray v. The South Carolina Railroad Company, 1 McMul. 385, was argued in the Supreme Court of South Carolina. It was admitted to be without precedent, (the counsel and court probably not being aware of the decision made in England the preceding year,) and was argued and decided on principle. The court in South Carolina came to the same conclusion, and on the same principles, as the Court of Exchequer in England. The next case arose in Massachusetts in 1842.—Farwell v. The Boston & Worcester R. Road Co., 4 Metc. 49. It was elaborately argued and considered, and the same decision made as in the two preceding cases. To the same effect, in the same State, is the late case of Hays v. The Western R. Road Co., 3 Cushing 270. The same doctrine is held in New York, in the case of Brown v. Maxwell, 6 Hill 592; and in Pennsylvania, in Strange v. McCormick, Law Reporter for April, 1851, p. 619. The principle on which all the cases rest, is also settled in North Carolina, in the well reasoned case of Heathcock v. Pennington, 11 Ired. 640; and also in

Alabama, in Williamson & Hitchcock v. Taylor, 4 Port. 234. To this strong array of high authority, the only case that I find opposed, is the Georgia case of Scudder v. Woodbridge, 1 Kelly 195. Even that case admits the principle, but holds, on some fancied grounds of policy or humanity, that it does not apply to the case of slaves. It is submitted that such a distinction is untenable on any principle of law, policy or humanity. According to that case, if a free white man and a slave are both hired as deck hands on the same steamboat, and they are both equally injured by an explosion occasioned by the carelessness or unskillfulness of the engineer, the white man would have no redress against the owner of the boat, but the owner of the slave would have such redress. Such a doctrine is absurd, and directly contrary to the decision of this court in 4 Por. 234. Nor is there any principle of policy or humanity that requires this distinction, but obviously the reverse. Certainly humanity would require of the owner of a slave, before hiring him out in as hazardous a business as that of a deck hand on a steamboat, to inquire and satisfy himself of the proper construction of the boat and its machinery, and the carefulness and skill of its officers, and make it also his pecuniary interest to inquire into this, by throwing on him the hazard of loss. On the other hand, if the loss is thrown on the steamboat owner, the slave owner need make no such inquiries. He need only satisfy himself of the solvency of the steamboat owner. It is easy to see by which principle the life and safety of the slave would be best protected.

Neither is there any good ground for the supposed distinction, by which the immunity of the master is supposed to depend on the fact of his having employed skillful and careful servants. This, it is true, is hinted at in some of the cases cited, but it has never been decided in any. It is scarcely a *dictum*. It has no foundation in principle, but it is wholly inconsistent with the principle on which the cases are decided. With respect to strangers, the liability of the employer does not at all depend on the general skill or want of skill of the servant. It depends on the unskillful or negligent conduct of the servant in the particular act which occasioned the injury. If a railroad company were to employ the most careless and ignorant man on earth as engineer, and an accident were to happen by which a passenger was injured, if it were shown that the engineer acted on that

particular occasion with due care and skill, the company would not be responsible. On the other hand, no matter how skillful and prudent the engineer may be, yet, if the injury were occasioned by his unskillfulness or negligence on that particular occasion, the company would be liable. The liability, then, does not depend at all upon the general skill or prudence of the servant, or his general want of skill or prudence. It would seem, then, that there is no foundation for the distinction attempted to be made.

This is an action on the case, for an alleged breach of duty. It is not an action on a contract, express or implied. In all the cases above cited, the courts recognize the settled distinction between actions on the case for a *tort*, and an action of assumpsit on a contract. They say that as to strangers, as to the public at large, there is a duty imposed on stage owners, steamboat owners, railroad companies, and others engaged in similar business, for a breach of which they are responsible to a stranger who is injured thereby; but as to their servants and employers, there is no such duty. As between the employer and employee, it is altogether a matter of contract. In all these hazardous employments, the hazard is as well known to the employee as the employer. The servant charges and receives higher wages in consequence of the greater risk, and there is no implied contract of indemnity against such risks. Having been paid the price he stipulated for to incur the risk, when loss occurs, it would be most iniquitous, not only to allow him to throw off the loss from his own shoulders, but to cast it upon one who has paid him to bear it. This just and equitable doctrine is fully recognized and asserted in the cases before cited.—See, especially, 4 Por. 239-40; 2 Met. 440; 4 *ib.* 57; 2 Story's R. 176; 1 McMullan 401-2; the opinion of Baron Alderson, L. Reporter for Dec., 1850, p. 391-2; the close of the opinion in L. Reporter for April, 1851, p. 623; 4 Metc. 56 and 60; 11 Ired. 643-4. If the principles contended for be correct, the court below erred in its charges and refusal to charge on these points.

The court also erred in charging, generally, that, if the loss was occasioned by the negligence of the servants of the defendants, the defendants were liable. The law is well settled, that in such cases the defendants are only liable for gross negligence, not for ordinary negligence. Precisely such a charge was held errone-

ous by this court in the case before cited from 4 Porter, and the judgment was reversed on that ground.—See cases before cited.

The court also erred in not giving the charge requested as to Parham's knowledge of the officers of the boat, and their character and qualifications, before he hired the negro to the defendants. If he had such knowledge, he certainly ought to be bound by it. This is also shown by the case in 4 Porter.

The court also erred in admitting the testimony objected to as the opinions of the witnesses as to Cook's character; also in allowing a witness to give his opinion as to the imprudence of crossing the river at a particular time and place. He should have stated the facts, and not his opinion. In Johnson v. The State, 17 Ala. 628, this court decided (Parsons, J., delivering the opinion) that a witness could not testify that on a particular occasion a man "looked serious." It was considered that this was not a fact, but an opinion, and therefore improper to be given in evidence. It is respectfully submitted that this is a strong case against receiving opinions in evidence, and as to what is opinion, as contra-distinguished from fact.

Certainly, the admission of the part of Charles's testimony which was objected to, was inadmissible.—Sills v. Brown, 9 C. & P. (38 Eng. Com. L. R. 247); Malton v. Nesbit, 1 C. & P. 70, (11 E. C. L. 318); Jemison v. Drinkald, 12 Moore, (22 E. C. L. R. 442).

There was strong evidence conducing to show, that, after the collision, and before the sinking of the boat, the boat was run to the shore, and every person had an opportunity to go ashore without risk; that the negro might have done so, by the use of ordinary prudence, but he unnecessarily and imprudently jumped overboard, in a state of alarm, and thus by his own wrongful act contributed to, and in fact caused, his own death. It has been seen from the case in 4 Porter, that the master can have no redress, unless the slave, had he been a free man, could have maintained an action. It is well settled, that "a plaintiff suing for negligence, must himself be without fault."—Brown v. Maxwell, 6 Hill 593; Rathbun v. Payne, 19 Wend. 400. "If the plaintiff's negligence concurred in any way in producing the injury, the defendant is entitled to a verdict."—Pluckwell v. Wilson, 5 Car. & P. 375, (24 E. C. L. R. 368.) See, also, on this point, Williams v. Holland, 6 Car. & P. 24, (25 E. C.

L. R. 261); Hartfield v. Roper, 21 Wend. 615; 6 Cowen 189; 12 Pick. 177; 11 East 60. This doctrine seems especially applicable to cases of collision. The case in which the doctrine is most clearly considered and stated, is the case of Jones v. Boyce, 1 Starkie's R. 493, (2 E. C. L. R. 482.) In that case the defendant was proprietor of a stage coach, in which the plaintiff was a passenger riding on the top. The stage, by the breaking of some of the harness which were defective, was placed in imminent danger of being upset, and the plaintiff jumped from the coach and broke his leg. Lord Ellenborough said, the plaintiff might recover, "if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril," &c. "On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover." In the case under consideration, all danger to the slave from the collision had entirely ceased; the boat had been run to the shore; passengers had passed from the boat to the shore, and back from the shore to the boat. Then the slave rashly, unnecessarily and imprudently jumped overboard, and drowned himself. Under such circumstances, the court should have given the charge asked on this point, and erred in refusing it.

Jno. A. Campbell, *contra:*

The rule of law found in the oldest books is, "that acts done by a servant, within the line of his employment, are esteemed to be the acts of the master; that it is through favor and indulgence a person is authorized to employ the agency of another, and consequently it is reasonable that he should be responsible for the conduct of his substitute within the line of his employment."—5 B. & C. 547 (12 E. C. L. R. 311.) The attempt to engraft an exception on this general rule was first made in England some years ago, and was, to a certain extent, successful. This was in relation to the master's liability to a servant for the conduct of his fellow-servant. The rule to be gleaned from the cases in England and this country, upon this subject, is, "that where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suita-

ble means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service."

In this case, the owner of the boat was himself the captain; his duty was to direct the navigation; he was engaged in the performance of his duties when the collision took place; the servant was under his immediate command and direction, and no evidence was offered tending to the conclusion, or even raising the suspicion, that the pilot acted without or against orders. The question involved is, whether an employer is responsible to his employee, for injuries occasioned by his want of skill or mismanagement, or by the want of skill and mismanagement of those acting immediately under his directions and in his presence.

In the case of Randleson v. Murray, 8 Ad. & E. 109, the owner of a ware-house was held liable to a carter in in his employment, for injuries received from the unskillful and negligent conduct of a porter engaged in his employment about the same ware-house. The case of Denison v. Seymour, 9 Wend. 9, places the liability of Cook beyond all question. The head-note is: "The master of a steamboat employed in the transportation of passengers, like the master of a vessel engaged in the merchant service, is answerable for the diligence of all to whom is entrusted the management of the vessel;" and he was held liable for the acts of his pilot, though he was not on duty himself. The Supreme Court of the United States, in the important case of The New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 6 Howard 344, 383, 393, intimate a doubt whether a party could contract for exemption from liability for negligence, unskillfulness or misconduct. A person assuming a charge requiring skill of which he is destitute, if a loss arises in consequence of his want of skill, is guilty of gross neglect; the want of skill is imputable as such.—2 Hawks 145; Story on Bailments §§ 175, 176, 179, 431.

The master of the vessel is the substitute for the owners, in all that concerns the navigation of the boat; his powers extend to the punishment of the crew, and to the use of whatever is necessary for the government of the vessel; and where the persons employed on the boat are slaves, this dominion is increased by their peculiar character, and the nature of their relations. This

dominion is given, because of the vast responsibility that attaches to his office. Life and property are both dependent upon his sagacity, fidelity and skill. To the parties who are subject to this dominion he is personally responsible for its exercise. The owners, who delegate to him this authority, are also responsible, because he is of their selection, is engaged to do their work, and they receive the profits.

The claim of Cook, in this case, calls for the establishment of the rule, that there is no responsibility between the owners and masters of the boat and the men on board. Suppose a slave were recommended as fit for the employment, and by his unfitness the boat suffered an injury. Would not his master be responsible? Is not every hired servant (free person) responsible for his negligence and misconduct to his employer? It is objected that the words of the charge are improper. We say, that, if Cook wished the degrees of the carelessness and negligence defined, by the court below, he should have requested the definition; the court was not required voluntarily to define them. The owner of the boat being the master, and the acts of carelessness or mismanagement which produced the collision being his, he is responsible for them. The words "carelessness and want of skill" cannot be made more expressive by the use of the qualifying word "gross." "Carelessness" is a superlative, and is equivalent to extreme neglect.

The charge of the court upon the conduct of the slave, in leaping into the river, is sustained by the decision of the U. S. Supreme Court in the case of Stokes v. Saltonstall, 13 Peters 181, upon which it was founded. The evidence shows that there was excitement, alarm, peril, confusion on board. Whose conduct occasioned all these? The law is stated with great precision by the Chief Justice, in the charge given to the jury as reported in 13 Peters, *supra*. To excuse the party who produced the peril, there must have been rashness, recklessness, fright produced by no adequate cause. The case of Vandenburgh v. Truax, 4 Denio 464, is an authority on this point; also Guille v. Swan, 19 Johns. 381. Even in those cases where the person who suffers the injury is in fault, damages are sometimes recoverable.—19 Conn. 507; 22 Verm. 213. The doctrine contended for by plaintiffs in error, that, if the plaintiff's negligence concurred in any way in producing the injury,

the defendants are entitled to a verdict, does not apply here. That principle applies to a case where both parties were in fault in creating the cause of danger: as where the injury was produced by collisions, in which the party injured was out of place, or driving furiously, or failed to keep a proper watch, or to maintain signals, and thus contributed to mislead the other, who inflicted the injury. This doctrine is qualified, as will be seen in the cases commented on in 19 Conn., *supra*. See also 22 Verm. 213; 41 E. C. L. R. 422. The case cited from 1 Stark. 493 does not sustain the exception. The charge in the case of Stokes v. Saltonstall, *supra*, was framed upon that case, and its meaning was fully examined in the discussion.

The remaining question is upon the evidence of character and skill, and the opinions of the witnesses upon the negligence. The opinions of witnesses were taken in 10 Howard 570. They are always taken in courts of admiralty.—Conk. Adm. 307, 308, 309. The authorities show that they are admissible in courts of law.—18 Ohio 375; 12 Illinois 369; 6 Ala. 212; 11 Ala. 732. The opinion of Charles was framed upon a full knowledge of the facts: he was present, and was acquainted with the rules of navigation. The case of Malton v. Nesbit, 1 C. & P. 70, sustains the admissibility of his evidence. The case of Jameson v. Drinkald, 12 Moore 148, also sustains the decision of the court below. The decision in Sills v. Brown, 9 Car. & P. 601, steers clear of this case. There, a nautical witness was asked, whether he thought, having heard the evidence in the cause, the conduct of the captain was right; our question was, whether a change of direction, at a particular time and place, and under given circumstances, was skillful and prudent.

The evidence offered to show the unskillfulness of Cook was admissible. The witness said, he had no reputation because he had no experience, and gave his own opinion from knowledge; and the court admitted the fact, and the opinion on which it was founded. The decision of the court is supported by 1 McLean's R. 543; 3 Dana 383; 17 Vermont 499.

The last question is, whether the plaintiff below could recover, if he might have found out the qualifications of the captain and pilot. I have attempted to show that there was a contract for ordinary skill, prudence and judgment on the part of Cook, and that he could not relieve himself from this obligation. The fact

that he was inexperienced only imposed a greater obligation for vigilance and care; he should have secured faithful officers and a capable crew. Parham was not required to look to this; he was authorized to repose upon the integrity of Cook, and Cook cannot controvert this right.

GOLDTHWAITE, J.—It appears from the record, that, in order to show the want of skill on the part of Cook as a steamboat captain, the deposition of a witness who had acted as such for many years, and was acquainted with Cook, was offered by the plaintiff below. In taking such deposition on interrogatories, the plaintiff had asked this question: "What is the general reputation of said Cook as a steamboat captain?" To this interrogatory the defendants objected, before the taking of the deposition, and at the trial also. The court decided, that evidence of such general reputation could not be given; but the witness, in answering such interrogatory, having stated that "Cook had no reputation, for the reason that he had no experience, and he regarded him as wholly incompetent for such a duty," the court overruled the objection, and allowed the answer to be read as evidence to the jury.

Our first impression, on the examination of this case, was, that the question was illegal, and that the answer, although it may have contained some evidence applicable to the issue, should have fallen with the question, for the reason that such portion, not being responsive to any interrogatory, was but the statement of the witness on oath. A more careful investigation has, however, satisfied us that the question itself was legal under the circumstances disclosed by the record. The action was against two parties, one of whom was sought to be charged as the actual wrong-doer, as well as part owner, and the other (Scott) simply as his co-owner. The principle established in the case of Walker v. Bolling, 22 Ala. 294, is, that the owner of a steamboat was bound to the exercise of ordinary care in providing competent officers; and unquestionably, under this decision, in an action to charge the owner, evidence showing that he had notice of the incompetency of a particular officer, by whose neglect the injury was occasioned, would be legal testimony. The general reputation of Cook for want of skill as a steamboat captain, if not evidence of the fact itself, at least tended to prove notice to the

owner, if the fact was otherwise established, (Branch Bank v. Parker, 5 Ala. 731;) and as such was admissible evidence. So also the answer, or at least that portion of it which said that "Cook had no reputation for the reason that he had no experience." The statement of an additional fact as the basis of the general character, is not, in our opinion, objectionable; and if it were so, a specific objection should have been made to that portion of the answer, as the court was not bound to separate the legal from the illegal. That this evidence was offered for the purpose of proving the unskillfulness of Cook, does not affect its competency, if the record shows that it was admissible for any other purpose, (Lawson & Swinney v. The State, 20 Ala. 55;) and in such case, if the party wishes to restrain or limit its effect, it must be done by requesting instructions to the jury with a view to that result.—Greene v. Tims, 16 Ala. 541.

Neither can the objection raised to the evidence of the witness Charles be sustained. He was the clerk of the Winona, had been in the business for many years, and, as we understand his testimony, was possessed of that degree of information as to the navigation of the river which would entitle him to speak as an expert, and as such to give his opinion as to the skill or want of skill manifested by a particular act on the part of the officers of the boat. A nautical person may give his opinion as to whether, upon the facts proved by the plaintiff, the collision of two ships could have been avoided by proper care on the part of the officers of one of them.—Fenwick v. Bell, 1 Car. & Kin. 312; Malton v. Nesbit, 1 Car. & Payne 70.

It appears from the record, that there was evidence conducing to show that the slave June leaped from the boat, into the river, when there was no necessity for him to have done so; and upon the trial it was insisted, that if his death was caused by his own rashness, and not by the act of the plaintiffs in error, they could not be held responsible. The charge given upon this point was, "that, if the death of the slave was the legitimate and natural consequence of the collision, though not the inevitable consequence, the defendants would be liable;" and the judge also added, "that if a man of ordinary care and presence of mind could have saved himself, yet, if the slave was frightened out of his ordinary presence of mind, by the confusion and alarm occasioned by the collision of the boats, and that collision was

the result of the negligent acts of the defendants, then they would be liable"; or, in other words, that the death in such a case would be the legitimate consequence of such negligence. In this charge there was no error.

We concede that, where the party who is injured by the negligent acts of another, has contributed by his own misconduct to produce the injury, he will not be heard to complain, and cannot recover.—Jones v. Boyce, 1 Stark. R. 493. But this principle has no application to the present case. That the death of the slave may have been the result of fright, or the want of presence of mind, occasioned by circumstances of excitement, confusion and danger brought about by the negligent acts of the defendants, should not be imputed to him as a fault; nor could we regard it in any sense as misconduct, if, under like circumstances, one should mistake the best means of safety, and lose his life in the effort to preserve it. The principles involved in this branch of the case, were fully and ably considered in Stokes v. Saltonstall, 13 Pet. 181, and the opinion of the court in that case sustains that portion of the charge to which we have referred.

Neither was there any error in the refusal of the court to instruct the jury "that, if the plaintiff knew or had the means of knowing the captain and the pilot of the boat, and their character for skill and care," this would relieve the defendants from liability for their negligence.

One of the legal propositions asserted by the charge as requested, is, that it devolves upon the bailor to ascertain the competency of the officers of the boat if he can do so; and this proposition cannot be sustained. We have decided, that it was the duty of the owners of the boat, to use due care in procuring competent servants or officers in the management of their business, and that the bailor has the right to hold them responsible for a failure to discharge that duty.—Walker v. Bolling, 22 Ala. 294. The officers of a steamboat are removable at the pleasure of the owners; and a just sense of what is due to the public demands their removal, whenever it is ascertained that, from want of skill or care, they are improper persons to discharge the responsible duties confided to them. The bailor can make no calculation upon the continuance of any particular captain or pilot, and ought not to be held to any inquiry as to a duty which the law properly devolves upon the owners, and which

the bailor has the right to believe they have discharged.—Hutchinson v. The York Railway Co., 5 W., H. & G. 341.

To the charge of the court, that where two persons are employed by a common employer in the same general business, and one of them is injured by the negligence of the other, the employer is not responsible therefor, as a general proposition we all yield our assent to. It is too well established, both upon English and American authority, to be now controverted.—Priestly v. Fowler, 3 M. & W. 592; Hutchinson v. The Railway Co., 5 W., H. & G. 341; Wigmore v. Jay, *ib.* 354; Murray v. S. C. Railroad Co., 1 McMullan 385; Farewell v. The Boston & Worcester Railroad, 4 Met. 49; Strange v. McCormick, Penn. Rep.; Brown v. Maxwell, 6 Hill 592; Coon v. The Utica Railroad, 6 Barb. 231; Hayes v. The Western Railroad, 3 Cush. 270. In relation to the charge that this rule did not apply in case the injury arose from the carelessness of Cook as captain, and that in such case both he and his co-owners would be responsible, the court is divided; the Chief Justice and Judge Ligon holding it to be free from error, while Judge Phelan and myself hold it to be erroneous. As the expression of our individual views on the question upon which we differ can determine no principle, we decline submitting them until the same question is presented before a full court.

The other portion of the charge, that if the collision occurred from the negligence or fault of the pilot, the owners were responsible, if they knew or had the means of knowing that he was careless and reckless, falls directly within the principle of Walker v. Bolling, *supra*, and in that there is no error.

It follows from what we have said, that there was no error in the refusal of the court to give the first charge requested, as, taken in connection with the evidence, it asserted the legal proposition, that although the pilot of the boat was reckless and careless, the owners were absolved from all responsibility, if the party injured and such pilot were servants in the common business. The last charge requested we have already considered.

The consequence of our disagreement upon the point referred to, is the affirmance of the judgment upon division.

Gibbons, J., not sitting.

COSTER'S EX'RS *vs.* BANK OF GEORGIA ET AL.

1. The assignee or endorsee of a note given for the purchase money of land, cannot stand in a higher or better position than the original payee or vendor occupied.
2. When lands are purchased by a partnership from one of its members, who pledges his entire interest in the company to indemnify it against any loss which it might sustain in the purchase, and guaranties that the land can be re-sold within five years for at least the amount of the purchase money, and the lands remain unsold after the expiration of the five years, an assignee of the notes given for the purchase money cannot assert a vendor's lien, as against a member of a company who had guarantied their payment, and had paid a part of them.
3. Nor can an assignee of the notes assert a vendor's lien as against a remote assignee of the vendor's interest in the company, who purchased *bona fide*, for valuable consideration, without notice of any such outstanding claim or equity.
4. The vendor, being a member of the company, cannot assert a vendor's lien, as against subsequent creditors, mortgagees, or purchasers, without proving that they advanced their money with notice of his lien.
5. The entire assets of a partnership are, in equity, subject to the payment of its debts.
6. Where money is loaned to a partnership on the faith of the partnership property, equity will consider the creditor, as between himself and the several partners, as a mortgagee, with a lien upon the property until his debt is paid.
7. An unrecorded mortgage is void, under the acts of 1823 and 1828, as to a subsequent mortgagee without notice, although his deed is also unrecorded.
8. When the legal title to real estate belonging to a partnership is vested in one of its members, the lien acquired by a judgment against him individually, in favor of a creditor of the company, is subject to the equities already existing over the property; and a judgment against the company itself would not operate as an efficient lien on the land.
9. In a contest in equity among several creditors of an insolvent partnership, for the marshalling of its assets and the settlement of their respective liens, a creditor who was not made a party to the original bill may be brought in as a defendant to a cross bill.
10. Where non-resident infants are necessary parties to a bill, the record must show that publication as to them was made in the manner prescribed in the third and forty-first rules of our Chancery Practice.

ERROR to the Chancery Court of Russell.

Heard before the Hon. W. W. MASON.

THE facts upon which the complainant's original bill was

filed may be thus briefly stated: In 1836, a company was formed, consisting of James Hamilton, James L. Pettigru, J. C. Vaughan, John G. Coster, and A. E. & C. Hexier. The objects of the association were, originally, to buy and sell lands on speculation, but afterwards the company engaged in the cultivation of cotton, and this formed a part of its regular business. The original intentions of the associates were, to confine the operations of the association to dealings in Mississippi lands; but the company, during its progress, purchased property in Alabama and Georgia, and engaged largely in the cultivation of cotton in Russell County, Alabama. The interests in the company, amongst the above named associates, were as follows: James Hamilton one fourth; James L. Pettigru one fourth; J. C. Vaughan one fourth; John G. Coster one eighth; and A. E. & C. Hexier one eighth.

After the formation of the company, in 1836, and after the interests of each of the parties had become distinctly defined, it was resolved by the company to vary its operations to some extent, and to engage in the cultivation of cotton. For this purpose, John G. Coster, the member of the company owning one eighth interest, agreed to advance to the company $100,000, to be invested in negroes for the use of the company, and in order to enable it to carry out its enterprise in the cultivation of cotton. About this time, say the 16th day of November, 1836, all the associates join in a deed, by which they convey all the property then on hand to James Hamilton, one of the associates, to be held in trust for the benefit of the company, and by which deed the said Hamilton is constituted the general agent and organ by whom the transactions of the company are to be carried on; and by the same deed all the property then of the company, and all that it may acquire in future, is pledged to John G. Coster, for the reimbursement to him of the money which he has advanced to and for the benefit of the company. This instrument seems to have been signed by all the parties who were associates at that time. A lot of slaves was purchased of one Middleton, and the title conveyed to Hamilton, in pursuance of the arrangement made by the preceding deed. It appears that the association actually commenced planting

in Mississippi, but not being satisfied with their success there, or for some other reason, the planting in Mississippi was abandoned, and the negroes and planting material were removed to Russell County, Alabama, where the association commenced planting.

The name which the association had taken, at its first formation, was, "The Mississippi Land Company"; but the location which was selected by the association for its planting operations in Alabama, being the Oswichee Bend, on the Chattahoochee River, the association, after its said location, assumed the name of the "Oswichee Company."

This removal and new location to the Oswichee Bend in Russel County, Ala., was in the spring of 1837. At this time one Jerry Cowles became a member of the association, and it seems to have been from him that the association purchased the lands which they proposed to cultivate in cotton on the Oswichee Bend. Cowles, by a conveyance from Hamilton and others, becomes interested in the concern to the extent of one fifth of the whole. The deed by which he becomes interested in the concern stipulates that the deed of 16th Nov., 1836, by which the property was conveyed to Hamilton, in trust for the company, and for the reimbursement of J. G. Coster, and Hamilton created the general agent of the association, is made part of the deed creating the said Cowles a member of the said association, and the same trusts in favor of the said J. G. Coster are declared in the last as in the first deed. The deed creating Cowles a member of the association is dated the 26th of April, 1837.

On the 24th day of July, 1837, Vaughan, who owned one fourth in the whole company, sold out to Hamilton and Pettigru his interest in the concern; and they, with their wives, on the 22d day of May, 1838, sold the same interest to the other partners, being then John G. Coster, A. E. & C. Hexier and Jerry Cowles; and thus making, in effect, as to the parties to the association, simply an exchange of Vaughan for Cowles, as at this date the three members of the association, Hamilton, Pettigru and Cowles, each owned one fourth of the concern, John G. Coster one eighth, and A. E. & C. Hexier one eighth.

On the 1st of April, 1838, the association, by Hamilton, its agent or organ, bought of Jerry Cowles thirty thousand acres

of land, lying in several of the counties in Georgia, for which they agreed to give the price of $150,000. The payments were made to Cowles by the bonds of Hamilton, guarantied by John G. Coster. These bonds were executed and delivered according to their agreement. Cowles, however, on the sale of this land to the association, guarantied to them that within five years they should be enabled to sell the land for as much at least as they had given him for it, and in case it did not sell for a sum sufficient to indemnify the company, that then he would make good to them any loss which they might sustain; and he pledges his whole interest in the association to make good this covenant. The half of these bonds, the purchase money for the thirty thousand acres of land bought of Cowles, was paid by the company. The other half, with a large amount of interest, was paid by the complainants, executors of John G. Coster.

Jerry Cowles, on the 6th day of April, 1840, conveys his interest in the company to the Hexiers and Hamilton, and this seems to have ended his (Cowles') connection with the association. On the 17th day of March, 1842, the Hexiers conveyed their interest in the association to John G. Coster, and the latter conveys his entire interest in the association to his son, G. H. Coster, who, in his turn, conveys to one Gibbs, and the said Gibbs, in 1845, conveyed the interest to the complainants, executors of John G. Coster, who had in the meantime died. On the 22d of September, 1846, Hamilton conveys all of his interest to the complainants, as executors; and on the 4th day of December, 1846, Pettigru conveys all his interest in the company to the said complainants, executors as aforesaid; the said executors thereby becoming sole proprietors of the lands and slaves, the property of the company.

It seems, when Cowles sold out his interest in the company to Hamilton and the Hexiers, the said Hamilton gave him three notes dated the 6th of April, 1840, one for the sum of $1900, payable on the 1st day of May, 1841; and two other notes dated as aforesaid, for the sum of $2500, each, one payable on the 1st day of May, 1842, and one on the 1st day of May, 1843, and all of said notes drawing interest from date at the rate of 7 per cent. per annum. These notes are represented in the present proceedings by Joseph Washburn, who claims them by regular endorsement in the course of trade from Cowles.

In the winter of 1840, and before Jerry Cowles retired from the association, the company, being in want of money, authorized their agent, Gen. Jas. Hamilton, to borrow money to the extent of $50,000 in South Carolina and Georgia, and to pledge the property of the company as security for such loan. In pursuance of this authority, Gen. Hamilton addressed himself to the State Bank of Georgia, and proposed to borrow $12,500, exhibiting his authority from the company, and proposing to pledge the property of the company as security, in pursuance of the authority. The State Bank of Georgia accept the proposition of Hamilton, and loan the money. Hamilton, it seems, prepares the deed of mortgage, or the instrument of writing found in pages 447-8 of the record, but, for some reason or other, (not disclosed in the record,) this instrument was not delivered, in fact, until 1847, when the agency of Hamilton had ceased and the company was in liquidation.

On the 7th day of July, 1840, the members of the association, at that time consisting of John G. Coster, Chas. A. Hexier and E. Hexier, J. L. Pettigru, and James Hamilton, unite in constituting the said James Hamilton their agent and attorney in fact, with a special written power for that purpose, to go to Europe for the purpose of negotiating a loan for the company, and clothed with power to mortgage in the name of the company the property of the company as a security for the repayment of the money realized by the said loan. Clothed with this power, the said Hamilton went to Europe and negotiated, through Messrs. Hope & Co., of Amsterdam, a loan for the sum of $225,000, on the sale of two bonds made and executed by the individual members of the said association, for the sum of $112,500 each; and to secure the faithful payment of these bonds, the said Hamilton executes a mortgage on all the property of the said company. The mortgage is to Hope & Co. alone, but at the time that the mortgage is executed, only one of the bonds for the sum of $112,500 had been negotiated to Hope & Co. But a stipulation is made in the mortgage, that if Hope & Co. conclude to take the second bond, or if they procure its negotiation, the mortgage shall be a common security for both of the bonds. In pursuance of this arrangement, Hope & Co. induced the house of Solomon Heine, composed of Solomon and Carl Heine, to take the last named bond, and they took it,

relying upon the mortgage security in the hands of Hope & Co.; and the latter house endorsed to them the said bond, and they hold as assignees of the said Hope & Co. Solomon Heine has since died, and Carl Heine is shown to be his sole surviving partner, as well as the sole heir to his estate.

Thus far, this is a simple narrative of the material events in the history of the company, as extracted from the record.

The record presents the following facts in the history of the pleadings:

First, Washburn filed an original bill, alleging that James Hamilton was individually indebted to him in the promissory notes above named, describing them as made by said Hamilton individually; that the consideration of said notes was land sold by Cowles to Hamilton, and that Cowles had a vendor's lien which enured to him by reason of his holding the notes in the usual course of trade; and he prays that an account be taken, and that a vendor's lien be declared, and the land sold to pay his debt.

James Hamilton alone is made a party defendant, and a decree *pro confesso* is taken against him, and reference made to the master to take an account. The notes are made exhibits to the bill, and purport to be executed by said Hamilton individually; and the lands said to have been sold by Cowles to him, set out in another exhibit to the bill. It does not appear when this bill was filed; but it appears that the counsel of Hamilton acknowledged service for him on the 14th of March, 1846.

At this point, the complainants, the Costers, executors of John G. Coster, file their original bill, setting out the history of the transactions of the company, many of which have been already detailed; and further stating the proceedings of the said Washburn, and his attempts to subject the lands of the said company to the payment of his debt, and also the attempts of the Bank of Georgia to collect their debt, setting forth that the Bank had proceeded by attachment against Hamilton, had obtained a judgment against him, and was proceeding to sell the lands and property of the said company to pay said debt. And the said complainants allege and assert that the liens of themselves and of John G. Coster, whom they represent, are superior to the claims of Washburn or those of the Bank of Georgia, and pray an injunction against both Washburn and said Bank; and such injunction is awarded.

In this bill of the Costers, they distinctly recognize the binding obligation and superiority of the claims of Hope & Co. and Carl Heine, and pray that such superiority for said debts be established. These latter are not made parties by the bill of the Costers, but the Bank of Georgia and Washburn are.

Washburn answers the bill, and asserts the superiority of his lien to all others, and insists that he is entitled to payment before all others; and he files a cross bill, in which he makes the same case, and makes the Bank of Georgia, Hope & Co., Carl Heine, the Costers, &c. parties. In his answer and cross bill, Washburn varies his allegations from what they were in his original bill; as by the original bill it would seem to be an individual and private transaction between Cowles and Hamilton, while by his answer to the Costers' bill, and by his cross bill, it would seem that Hamilton dealt, not for himself, but for and on account of the company whose agent he was entirely. The evidence of Hamilton, however, contradicts this, and asserts that he dealt with Cowles in that transaction, not as agent of the company, but on his own account.

The Bank of Georgia answers the bill of the Costers, asserting the superiority of its claim to all others, and in its turn files a cross bill, in which all the other parties are made defendants. The Bank, in its answer to the Costers' bill, responds to one of the recitals of that bill relative to the judgment of the Bank against Hamilton, and insists upon its validity; in its cross bill, it asserts the binding efficacy of its mortgage lien, and its superiority over all other liens; but it does not assert or rely upon the lien of its judgment recovered under the attachment issued against Hamilton. Indeed, the case made by the cross bill of the Bank is entirely outside and independent of the attachment or judgment lien. It alleges and proves that the Bank parted with its money on the faith of the representations of Hamilton, that he would pledge the property of the company for the security of the debt, and shows that Hamilton had ample power and authority to make such representations; and insists that, whether the mortgage was delivered or not, as between the Bank and the members of the company, it makes no difference, as they have a lien in equity on all the assets of the company for the payment of the debt.

Hope & Co. and Carle Heine answer this bill, and insist upon

the superiority of their own lien, as they are subsequent mortgagees for value, and *bona fide*, without notice of the claims of the Georgia Bank, whose pretended mortgage was not recorded. They also claim to be judgment creditors, because they say that the company, on the 2d day of May, 1842, confessed a judgment in their favor for the sum of $225,000; and, therefore, both as mortgagees and creditors with a judgment lien, their claim is superior to that of the Bank of Georgia and all others claiming a lien on said property; that when they parted with their money, and took the mortgage which they exhibit, they had no notice of the claim of the Bank, and made diligent inquiry for liens and incumbrances on the said property, and could find none; and to the same effect is their answer to the cross bill of Washburn.

The mortgage of Hope & Co. bears date the 24th day of December, 1840, and was acknowledged before the American consul in Amsterdam, and was placed on record in Russell County, on the 11th of February, 1841.

The Bank of Georgia claims that its mortgage is dated the 23d of January, 1840, that being the date when its loan to the company was completed, and that being the date of the paper prepared by Gen. Hamilton, although not delivered until some time in 1847, making the date of their lien older in point of time than the lien of Hope & Co.; and, inasmuch as the mortgage of Hope & Co. was acknowledged before the American consul in Amsterdam, it did not authorize it to be recorded: therefore both its mortgage and that of Hope & Co. must be considered unrecorded, and neither can claim priority over the other by reason of the registry acts of Alabama.

The chancellor decreed in favor of Washburn on his original bill, and dismissed his cross bill; and also in favor of the Bank of Georgia, giving it and Washburn a preference over both the Costers and Hope & Co. and Carl Heine. From this decree the Costers and Hope & Co. take their writ of error, and here assign for error the decree of the chancellor below in giving a preference to the liens of Washburn and the Bank of Georgia over their's and Hope & Co. and Carl Heine upon the funds and assets of the Oswichee Company.

The said Washburn assigns cross errors, that the chancellor dismissed his cross bill.

The Costers further assign for error, that the infants sought to be made parties by the Bank of Georgia, are irregularly made parties.

JOHN A. CAMPBELL, for Hope & Co. and Carl Heine:

The first question which arises, is as to the effect of the registration laws upon the Bank of Georgia. The act applicable to the case is found in Clay's Digest 154 § 18. Hope & Co. are mortgagees for a valuable consideration, without notice. The mortgage to the Bank was not recorded, nor at any time lodged for record. The consequence of nullity is then denounced by the statute. It is said, however, that the mortgage to Hope & Co. did not convey the legal title. The answer is to be found in the mortgage itself; its terms are, "granted, bargained, sold, aliened, conveyed and released." An action of ejectment could have been maintained on it.—1 Ala. 708; 10 *ib.* 166. Hope & Co. (and the Heines) were *bona fide* purchasers under the act of 1828, creditors under the act of 1828, (Clay's Digest 255 § 5,) and mortgagees under the act of 1823, (*ib.* 154 § 21.) They are purchasers; for a mortgage, at law, conveys the estate for a valuable consideration, and transfers the right of property and possession. The fact that the estate is defeasible, or that it is qualified, does not change the relation of the grantee, as a purchaser. They are creditors; for, in equity, the grantor may redeem, upon the payment of the debt, notwithstanding the forfeiture of the mortgage. He is a creditor, with a specific lien on the property, and is therefore entitled to protection against an unrecorded conveyance. The consideration paid by Hope & Co. for the bonds described in the mortgage, was a valuable consideration. They advanced their ready money, on the faith of the security, as a valid, subsisting, unincumbered security, after full inquiry and due caution. Neither of the cases cited from 11 Ala. (781, 1067,) establishes that Hope & Co. did not have the legal estate, nor pay a valuable consideration. The act of 1823, however, specifies a mortgagee, *eo nomine*, as a person entitled to protection from an unrecorded deed.

The point is made, that Hope & Co. did not have a legal acknowledgment of their mortgage, and that, consequently,

they will be postponed; and cases are cited from 2 Johns. Ch. R. 303, and 2 Lomax 366, to show that a subsequent mortgage does not obtain the preference over a prior one, unless it is recorded. The Alabama statute does not require, as a condition of the nullity of the unrecorded mortgage, that the subsequent deed shall be recorded. The clause in the English statute of Anne, and the early Virginia and New York statutes, requiring a due record of the subsequent deed or mortgage, is not found in our statute. The nullity arises, whenever a subsequent purchaser or mortgagee has purchased for valuable consideration, without notice of the unregistered deed: Cruise's Digest, tit. Deed, ch. 29. A portion of the New York statutes do not contain the clause providing for priority according to date of registration, but are similar to our act, which avoids the unrecorded deed in favor of the subsequent *bona fide* purchaser and mortgagee; the decisions in such cases are as we contend they should be in this.—19 Johns. 281; 2 Lomax's Digest 370; 17 Ohio 226; 1 Peters' S. C. R. 552; 6 Barbour's S. C. R. 60.

It is said that the rights of the Heines, under the mortgage of Hope & Co., is an equitable interest, and that their situation is not so good as that of Hope & Co. This cannot be true. They and Hope & Co. severally advanced the money specified in the mortgage, and that security was taken for both, as holders of the two bonds described in it. As against a claimant under another mortgage, both stand in the same position, as purchasers without notice. Hope & Co. hold the legal title conveyed by the mortgage, for the joint benefit of themselves and Heines. The latter are their assignee, and occupy the position of their grantor. In the determination of the rights of claimants under the mortgage of Hope & Co. and those claiming adversely by another security, the Court of Chancery decides the question, by ascertaining the relative strength of the two mortgages. The claimants under the mortgage, whether by legal or equitable assignments, are entitled to the benefit of the legal estate; they have a right to call for it,—a right to demand the legal, to perfect the equitable assignment.—7 Ala. 367; 8 *ib.* 866; 1 Johns. Chan. 119; 7 Cranch 69, 97; 31 Maine R. 28; 1 Term R. 761; White & Tudor's Cases 70, 85.

The Bank of Georgia claims that its position, in regard to Hope & Co., has been improved by the issue and levy of an attachment against Hamilton, and the rendition of a judgment against him personally. If this view had been taken during the progress of the cause, some outline of it would probably have appeared in the pleadings of the Bank. No reference is made by its bill to the attachment, and no reliance is placed in it upon these transactions. It is enough to say, that the decree must rest upon the allegations of the bill, and the proofs correspondent to them.—See cases collected in Reavis' Digest 263, § 376.

As to Washburn's claim, as against Hope & Co.: The above argument upon the rights of Hope & Co. against the Bank of Georgia, apply with equal force to this case. The Bank had a perfect estate, founded on a deed legally made, and the only fault in it was, the failure to place the deed on record according to the statute. It was prior, in point of time, to Washburn's equitable lien as resulting from the sale by Cowles to Hamilton. That equitable liens are displaced in favor of *bona fide* purchasers or mortgagees, is well settled, by decisions of our Supreme Court.—Houston v. Staunton, 11 Ala. 413; 5 Monroe 195. Miller, in his work on Equitable Mortgages, page 120, says, that an equitable mortgage may be "invariably defeated by the creditor of the mortgagor clothing himself with the legal estate of the property mortgaged, provided he had not, at the time of advancing the money, notice of the equitable security. Thus, if the mortgagor, immediately after having deposited his deeds by way of security, execute a legal mortgage of the same property, to a person who is ignorant of the previous deposit, the legal mortgagee may effectually displace the title of the latter, although not a muniment of title accompanied his mortgage deed."

In deciding against the claim of Hope & Co., the Chancellor pronounces it void, because their mortgage was not recorded; citing 5 Ala. 324, and 3 Stew. & P. 397. The application of these decisions to this case, is not perceived. Supposing the act of 1828 to apply to this case, neither Washburn nor the Bank of Georgia was a subsequent creditor or purchaser. They had acquired liens, prior in point

of time, one legal in form, the other equitable, and both invalid against a *bona fide* mortgagee without notice, the first for want of registration, and the other on the general rule of equity above cited. Nothing is found in the bill of the Bank of Georgia in reference to a judgment in its favor; and the same is true of Washburn's bill. The answers of Hope & Co., however, affirm a judgment in their favor against Hamilton and others. This judgment was confessed to secure the mortgage debt, and to protect it against incumbrances. The authorities cited show that this judgment would override the dormant lien of a vendor for unpaid purchase money; and by the statute of registration, it would defeat the unrecorded mortgage in favor of the Bank of Georgia.—11 Ala. 413; 9 *ib.* 436; 6 *ib.* 301; 7 Wheaton 46; 2 Gratt. 182, 186; 3 Leigh 597. If there had been an interest in Hamilton, or in the Oswichee Company, liable to the lien of a judgment, this judgment binds it. No other judgment is before the court, in the two suits to which Hope & Co. and Heines are parties.

It is said that the lien of Hope & Co. and Heines under their judgment, is impaired, for that indulgence has been given. The lien should have been impeached for that reason, and, until it is impeached, the objection will not be noticed. Indulgence to a debtor is evidence of collusion; but it does not avoid a levy, nor destroy a lien. The question only arises where there are rival execution creditors, the one vigilant and active, the other fraudulently indulgent. From the frame of the bills in these cases, there is no rivalry between the plaintiffs and defendants, in reference to their judgments, as the plaintiffs do not affirm the existence of their judgments. We have, then, a legal mortgage,—that is, a conveyance operative to carry the legal estate,—with a judgment on the debt against all the members of the Oswichee Company, to oppose to a prior unrecorded mortgage, or a prior lien arising from a failure to pay the purchase money. Whether we claimed by the one right or the other, we should be preferred to the claims of Washburn and the Bank of Georgia. Had we nothing but our judgment, this would be our advantage; but we have a specific lien by deed, as well as the general lien of the judgment, and the statutory protection in favor of judgment creditors against dormant liens.

The counsel for Washburn and the Bank of Georgia treat the act of 1828 as a modification of that of 1823, and argue that the time for recording mortgages has been reduced to sixty days. This has not been the opinion of the profession. The act of 1828, so far as concerns deeds of trust upon personal estate to secure debts, has been construed to embrace mortgages of personal estate; but it has never been decided, that the deeds of trust upon real estate, mentioned in that statute, embrace mortgages of real estate. There was a general statute on the subject of mortgages, which allowed six months for registration. The act of 1828 was designed to embrace the case of personal property under incumbrance, which was stationary in a county, there being no such statute before that time, though there was a statute providing for the registry of deeds which conveyed property coming from another State, or where the property was removed from one county to another. A deed of trust conveying personal property, is void, if not recorded in thirty days; but sixty days are given for the registration, if real estate is included. Deeds of trust are usually given by embarrassed or insolvent debtors; a mortgage is the security of solvent persons, usually given upon sales of property, or in transactions of loan and borrowing. The term 'mortgage' being used in one statute, while the other is confined to deeds of trust, the court will apply each expression to its appropriate subject. This argument was submitted in the case of The Ohio Life and Trust Company v. Ledyard, 8 Ala. 866; but the court did not decide the question.

Hope & Co., then, have the best lien. Theirs is a legal estate; they took their mortgage without notice of the claims of Washburn and the Bank of Georgia. They are *bona fide* mortgagees, and as such entitled to notice, either in fact or by construction of law, that is, by the registry of the first mortgage. They are not affected by judgments or attachments, because the interest on which their mortgage operated was not bound by any judgment or attachment lien, and because nothing of the kind is relied on in the pleadings.

Hilliard & Thorington and John A. Campbell, for Coster's Executors:

There is no *litis contestatio* between the Costers and Hope & Co. and Heine. The Costers affirmed, in their bill, the prior-

ity of Hope & Co.'s and Heine's claim, and did not make them parties. The Bank of Georgia and Washburn filed original bills in so far as Hope & Co. and Heine were concerned, but in the nature of a cross bill as against the Costers, Hamilton and others: they set up their liens and mortgages against the company, and against the Costers, as creditors of part owners of that company, with mortgages on the shares, and they deny the priority of Hope & Co. and Heine to satisfaction.

The only evidence given by Washburn of a lien, is found in the agreement of the counsel for Hope & Co. and Heine; and it is clear, that this admission is not evidence against any other parties. No evidence was taken by him to prove the averments of his answer, or the allegations of his cross bill, as to the consideration of the notes, or the property sold by Cowles to the company. If Hope & Co. and Heine had filed their answer, affirming on oath the truth of the facts admitted by their counsel, the answer could not be used as evidence against their co-defendants.—2 Dan. Ch. Pr. 981; 8 Porter 270; 3 Ala. R. 83; 4 Ala. R. 187. Washburn's case is not only not proved, but is disproved by the evidence of the Costers.

Again; the statements of Washburn's bill and answer are wholly inconsistent and contradictory. He asserts a vendor's lien, which is entitled, as he insists, to priority over every other lien, on the ground that the notes held by him were given by Hamilton to Cowles for one fourth undivided interest in a large body of lands; while in his cross bill he asserts that the notes were executed by Hamilton as trustee of the company, in consideration of Cowles' interest in the lands and negroes of the company, and in certain other lands. The proof conclusively shows that Hamilton did not purchase as the trustee of the company, but for himself individually. The contract of sale did not convey any specific parcel of land, to which a vendor's lien could attach, but a mere interest in a joint stock company. This interest, as Hamilton testifies, was to be estimated after the payment of the debt due John G. Coster, and the other debts of the company. Nor had Cowles himself any lien on the lands to convey, as he had previously relinquished by deed all his rights.—Hall's Executors v. Clarke, 5 Ala. R. 363. Washburn claims only as the assignee of Cowles, and can assert no other lien than that which Cowles had, if any. The sale by

Cowles to him was of his interest in the firm, and that interest consisted of a balance remaining after the payment of debts. Among these debts, thus to be paid, was that of Coster. The conclusion results, that Washburn would have no lien as against the Costers, even if the facts of his bill were established.

The claim of the Bank of Georgia is rested on two grounds: first, the judgment recovered against Hamilton in 1842; and, secondly, a paper purporting to be a mortgage executed by Hamilton. The attachment was sued out against Hamilton alone, and the judgment recovered against him alone; it can, therefore, only bind his interest in the property. Hamilton's possession was that of a trustee merely, and the Bank, having recognized him as a trustee, was bound to know the extent of his authority. A judgment lien upon a trust estate cannot be enforced.—Coote on Mortgages 186. In its cross bill, the Bank seems to have abandoned its reliance on the judgment lien, and sets up a pretended mortgage. This paper bears date in January, 1840; but the proof clearly shows that it was not delivered until 1847, when Hamilton was no longer the trustee of the company, and when he had no interest whatever in it. Delivery is essential to the validity of a deed of any kind; so long as the grantor or mortgagor retains possession of the paper, without ever having delivered it, the gift or conveyance is imperfect, and the deed is void.—Frisbie v. McCarty, 1 S. & P. 56. The paper is, also, fatally defective in the manner of its execution: it is not executed in the name of the company, but is signed by Hamilton as an individual.—5 Peters' R. 349; 23 Wendell 435; 4 Hill 357.

There are, also, errors in the manner in which parties have been made, to the bills of both Washburn and the Bank: The infant heirs of Coster are made defendants to the Bank's cross bill; but the copy of the advertisement was sent to persons called trustees, instead of being sent to the persons designated in the rule.—Clay's Digest 612, Rules 3 and 41; 16 Ala. R. 509; 6 Ala. R. 452; 5 Ala. R. 158; 1 Ala. R. 379. The same error is found in the orders of publication made on Washburn's cross bill. And the recitals in the decretal orders do not show a compliance with the decretal orders. The demurrers to the cross bills should have been sustained, because Hope & Co., with whom was the main controversy on the cross bills,

were not parties to the original bill; and for the further reason, that the matters of the cross bill did not grow out of the original bill, but were independent of it.—3 Dan. Ch. Pr. 1742; 15 Ala. 501.

John E. Ward, J. E. Belser and N. Harris, for the Bank of Georgia:

On the 23d of January, 1840, Hamilton borrowed $12,500 from the the Bank of Georgia, for the benefit of the Oswichee Company, and on the faith of its property. This debt was contracted while the Bank was ignorant of the equities existing between these parties, and while Hamilton had the exclusive control and management of all the interests of the company, and was held out to the world as its agent. Independent, then, of all questions of copartnership, mortgages and judgments, the property of the company is liable for the payment of this debt. —Story on Agency 55, 84, 115, 116, 117, 118, 451; 1 Kelly 428; 6 Geo. R. 171; Angell and Ames on Corporations 178; Story on Contracts 189; Hill on Trustees 425. In his capacity as agent, Hamilton incurred debts which were paid by Coster; he purchased lands from Jerry Cowles, giving him an interest in the association, without the knowledge of the other parties in interest, all of which acts were subsequently ratified by them. In this capacity, Hamilton gave the bonds of the company to Cowles, the payment of which was subsequently guarantied by John G. Coster; in this capacity, Hamilton purchased from Pettigru forty-nine negroes, and a larger number from Middleton; and the entire record exhibits Hamilton as the sole manager of this whole estate. In addition to this, the legal title to all this property was in Hamilton. That the trust property is responsible for goods furnished, or for debts contracted on the faith of that property, see 4 Dess. 19, 591; 1 McCord's Chan. 267; R. McCharlton's R. 376; 9 Geo. R. 223.

But the relations existing between these parties created a partnership, and the debts of that partnership must be paid, before a court will consider the rights and equities existing between the parties themselves. That a partnership was created among the parties, see Story on Partnership 1, 2, 4, 39, 606; 3 Kent's Com. 27, 28; 8 Geo. R. 235. And that the

partnership debts must be paid, before a court will regard the rights and equities existing between the partners, see 3 Kent's Com. 26; Story on Partnership 606 §§ 77, 410; 2 Story's Equity § 1253.

But it is alleged, that the Bank has abandoned its claim on the partnership property, by proceeding by attachment against Hamilton alone. The legal estate was in Hamilton alone, and against him alone could a judgment be obtained to bind it.—Clay's Digest 350 § 31; Story on Partnership § 92; 2 Story's Equity § 1207.

In the consideration of the written and express authority of the 1st January, 1840, and the mortgage given by Hamilton to secure the payment of the debt contracted by that authority, a question of fact is presented: Is that paper genuine, and was the money borrowed by Hamilton under it? These facts are so clearly proved by the evidence, that "the probation bears no hinge nor loop to hang a doubt on." But it is contended, that, notwithstanding the proof of these facts, no lien is created, because the mortgage was not signed by each one of the parties, *per* James Hamilton, their attorney. This doctrine is undoubtedly true, where the party signing is acting only as agent or attorney; but the principle does not apply in this case, because the legal title and estate were in Hamilton.

The deed having been executed, the court will presume a delivery.—Gresley's Eq. Ev. 371. No proof of an actual delivery is now required.—4 Kent 455; 1 Edw. Ch. 497; 5 Humph. 411, 412; 3 Mason 401. There was an agreement to deliver, and equity will consider that as done which was agreed to be done.—1 Story's Equity § 64 g. The record shows an agreement, placed there by the solicitors of the plaintiffs in error, and the court will hold the parties bound by it.—Story's Eq. Ev. 39.

Hope & Co. were proper parties to the cross bill filed by the Bank, because it was necessary that all parties having any interest should be before the court.—Story's Eq. Pl. § 72; Clay's Digest 352 § 44. A cross bill is in the nature of an original bill, and there is no ground of demurrer to such a bill which will not hold to an original bill.—Story's Eq. Pl. §§ 628, 629. If Hope & Co. are improper parties, not being within the jurisdiction of the court, it is no cause of demurrer on their

part, because the decree would not have been binding on their interests if they had not appeared.—Story's Eq. Pl. § 544; 5 Geo. R. 596. This argument applies to all the parties who were brought in by publication; they are not bound by the decree, and therefore cannot complain on error that they were not properly put in default. Again; no such point was made in the court below, and it is therefore no ground of error.

The parties, then, being properly before the court, the question arises, how are the claims on the fund to be paid. The claim of the Bank against the Costers has already been considered. The claim of Washburn, however just, is secondary to that of the Bank, because, without mentioning other reasons, Washburn's notes are dated subsequent to Cowles' authority to Hamilton to borrow from the Bank, and consequently, the loan being effected on the faith of all this property, at the time the debt was contracted, the vendor's lien and every right that Cowles had were pledged for its payment. The Bank, then, held an equitable lien on this property, which would require its debt to be paid in preference to all other debts existing at the time. On the 7th of July, 1840, a power of attorney was given to Hamilton to borrow money in Europe. On the 19th of October, 1840, the two bonds for $225,000 each were executed. On the 24th of December, 1840, a mortgage was given by Hamilton to secure the payment of these bonds; this mortgage was recorded in Russell County on the 11th of February, 1841, but its record was of no force, because it was not so executed as to entitle it to be recorded.—Clay's Digest 153 §§ 255, 256; 7 Geo. R. 531, 533. And as no constructive notice was thus given to the Bank, so no actual notice was brought home to it. The Bank, then, has the oldest equitable lien, which is void only as to creditors and subsequent purchasers.

Hope & Co. are neither creditors nor subsequent purchasers. That they are not creditors, within the meaning of the statute, see 11 Ala R. 691, 694. They are not subsequent purchasers, because, to make them such, the legal title must have passed to them.—11 Ala. R. 1081, 1083. In giving effect to a deed, the law will carry out the intention of the parties.—11 Ala. R. 781. It was never the intention of the parties in this case to pass the legal title, but only to create a security. The legal title does not pass from mortgagor to mortgagee at the execution

of the mortgage.—4 Kent's Com. 160 n; 1 Kelly 193; 10 Geo. R. 73; 19 Ala. R. 758; 8 Ala. R. 706; 3 S. & P. 406. A subsequent unrecorded mortgage, when the first mortgage is not recorded, acquires no lien superior to the first; they are both but equitable liens, and the oldest equity will prevail.—1 Story's Equity 419, 420; 2 Johns. Ch. R. 603; 2 Lomax 366.

An attachment against Hamilton was levied on this property on the 18th of March, 1842, and a judgment thereon obtained against him on the 17th of October, 1842. This was the proper judgment to bind the property, because the legal title was in him.—Strong on Partnership § 62; 2 Story's Equity § 1207; Clay's Digest 350 § 31. The Bank, therefore, as against the unrecorded mortgage of Hope & Co., and without actual notice of that mortgage, is a creditor, within the legal acceptation of that term, as against whom said mortgage is void.

The judgment confessed in favor of Hope & Co., on the 2d of May, 1840, can give Heine no lien, and is void as to Hope & Co., because colorable in part.—9 Ala. R. 305, 311. But the lien of the Bank's attachment exists from the 18th of March, 1842, the time of its levy, and is, therefore, the oldest lien.—8 Ala. R. 613, 616, 617. The judgment was suspended by Hope & Co., and their lien thus lost.—15 Ala. R. 18, 128. This judgment was confessed by Hamilton to protect the property from the pursuit of other creditors, and is therefore fraudulent and void. Hamilton was the only representative of Hope & Co., in their assent to this judgment, and, without the consent of the parties, a judgment taken at the first term is void. Hamilton's letter, therefore, is evidence of the understanding and agreement under which this judgment was taken.

This property is the only property subject to the Bank's claim, while Coster's whole estate is liable for the payment of the bonds to Hope & Co. and Heine: the Bank, therefore, should be paid out of this fund.—Story's Equity §§ 499, 558, 633, 642.

Belser & Rice, for Washburn:

The original bill was filed by Washburn to enforce a vendor's lien on real estate for the purchase money, and was properly filed.—Foster v. Atheneum, 3 Ala. R. 302; Roper v.

McCook, 7 Ala. R. 318; Conner v. Banks, 18 Ala. R. 42; Kelly v. Payne, 18 Ala. R. 373; 2 Story's Equity §§ 1216 to 1233.

The notes on which Washburn's loan is predicated, were signed by Hamilton; the bill was filed against him, and service on him perfected; and a decree *pro confesso* was afterwards regularly taken against him.—Levert v. Redwood, 9 Porter 8; Pittfield v. Gazzam, 2 Ala. R. 325; Cowart v. Harrod, 12 Ala. R. 265; Mobile R. R. Co. v. Talman, 15 Ala. R. 472.

When a decree *pro confesso* is regularly taken, it obviates the necessity of proof in the cause.—Wellborn v. Tiller, 10 Ala. R. 306; Arnold v. Shepherd, 6 Ala. R. 299; Butler v. Butler, 11 Ala. R. 668; Hartley v. Bloodgood, 16 Ala. 233; Garrett v. Ricketts, 9 Ala. R. 529. It is of equal dignity with a judgment at law.—1 Story's Equity § 547.

A decree *pro confesso* can only be set aside by filing a full and complete answer before the hearing.—Pond v. Lockwood, 11 Ala. R. 567; Davenport v. Bartlett, 9 Ala. R. 179; Keenan v. Strange, 12 Ala. R. 290.

A vendor's lien for the payment of the purchase money of land, with a decree *pro confesso* and an ascertainment of the amount of purchase money due, is no longer a secret trust, as some of the cases in the first instance call it. To Hamilton and his associates Washburn's lien never was, at any time, secret; and the decree against Hamilton binds all the members of the company and their representatives.—1 Green. Ev. §§ 171, 172, 177, 189; Salle v. Lightfoot, 4 Ala. R. 700; 2 Hayw. 351; 9 Leigh 473; 5 Pick. 380; 9 Ala. R. 572; 1 Story's Equity §§ 405, 406.

If the decree is evidence of Washburn's vendor's lien, and of the amount due on the notes on which it is based, and Hamilton and his associates and their representatives are affected by it as evidence, then the admissions of Hope & Co. and Heine, made by their attorney, are binding, independent of Hamilton's testimony, which was taken without notice to Washburn.—1 Green. Ev. § 186; McCravey v. Remson, 19 Ala. 430.

Washburn's cross bill was improperly dismissed; it should have been retained, first, so far as it asserted a vendor's lien; and, secondly, as it protected Washburn, as a creditor of the company, against all of the members and their representatives,

and also against Hope & Co. and their transferree.—Cullum v. Erwin, 4 Ala. R. 452; Nelson v. Dume, 15 Ala. R. 501; Cummings v. Gill, 6 Ala. R. 562.

The decree in favor of Washburn on the original bill, pleadings and proof, was correct.—See authorities cited in brief for Bank of Georgia.

Washburn was a creditor of Hamilton, and of the company, at and before the execution of the mortgages. In the absence of proof, the legal presumption is, that the notes were endorsed to Washburn contemporaneously with their date, or, at all events, before any of them became due.—Pinkerton v. Bailey, 8 Wendell 600. Washburn, then, being a creditor before the execution of the mortgages, and the mortgages being unregistered, a court of chancery will not become *active* against him, and postpone him to these unregistered mortgages, especially as he has a vendor's lien for unpaid purchase money; at all events, this cannot now be done, as there is no proof to warrant it. Hamilton's evidence cannot be received as against Washburn, who had no opportunity to cross-examine him.

The pretended judgments by confession against the company are wholly invalid, either as judgments or as evidence, first, because they do not show the names of the parties, (Reid & Co. v. McLeod, 20 Ala. R. 576; 2 Missouri 207;) secondly, because Hamilton was the only defendant named in the writ who was either served or accepted service, and he had no authority to accept service for the company; and thirdly, because they are fraudulent, being for a much larger sum than was due.—Marriott v. Givens, 8 Ala. R. 712.

GIBBONS, J.—As the claim of Joseph Washburn is the one first arising upon the present record, we deem it proper to dispose of it before proceeding to the consideration of the other claims presented. The lien set up by Washburn is what is usually termed a vendor's lien for the purchase money of real estate sold, but the purchase money of which still remains due and unpaid. This is sometimes termed an equitable mortgage, in favor of the vendor, in order to enable him to realize the payment of the money for which he agreed to part with his property.

It may safely be assumed as a principle, that the assignee or endorsee of a note given for the purchase money of real estate,

cannot stand in a better or higher position than the original payee or vendor of the property. Let us inquire, then, what would be the rights of Jerry Cowles, if he was the party seeking to enforce the vendor's lien insisted upon by Washburn.—As against the Costers, who represent the claims of John G. Coster, it could not prevail, because Cowles, when he became a member of the company, recognized the right of John G. Coster to hold all the property of the company, and all that it might acquire, subject to his lien for his reimbursement for the advances which he had made; and because Jerry Cowles had pledged his entire interest in the company, to indemnify the company for any loss which it might sustain in the purchase of the thirty thousand acres of land for one hundred and fifty thousand dollars. John G. Coster had guarantied the payment of the bonds given to Cowles in payment of this one hundred and fifty thousand dollars, and the executors of the said John G. had paid of these bonds seventy-five thousand dollars, with a large amount of interest, whilst the Georgia lands, which were to have been sold within five years, according to the covenant of Cowles, without loss, are yet unsold, and all the share of the said Cowles in said company, is subject to make good to said company the said covenant.

Cowles could not have insisted upon a vendor's lien, as against the Costers, for another reason. He sold to Hamilton and the Hexiers, and they, for a *bona fide* and valuable consideration, sold and conveyed the interest which they thus acquired from Cowles to the Costers, the complainants, without notice of any such outstanding claim or equity. This would defeat Cowles' vendor's lien, even if he had shown himself in other respects entitled to one.—Houston v. Staunton, 11 Ala. 412; 5 Monroe 195.

As against the Bank of Georgia, Hope & Co. and Carl Heine, Cowles could not have asserted a vendor's lien, without proving that they advanced their money with notice of his lien. So far as respects the Bank of Georgia, we find the name of Cowles signed to the paper which authorized Hamilton to borrow the money and pledge the property of the company as a security for its repayment. As respects subsequent creditors, mortgagees or purchasers, Cowles, or Washburn who claims through Cowles, would have to establish the fact that such subsequent purchaser, mortgagee, or creditor became such with full notice

of his existing equity over the property, before he could prevail against their rights. We look in vain through this whole record, to find any evidence on which the claim set up by Washburn can rest with any plausibility. The decree of the Chancellor was right in dismissing his cross bill, and he should also have dismissed his original bill. We do not deem it important to notice the question of practice as to the different cases presented by the original and cross bills, as, in our opinion, neither the one nor the other presents any case to be entertained in a court of equity as against the Bank of Georgia, the Costers, or Hope & Co. and Carl Heine. This bill is, therefore, dismissed with costs.

The question next arises as to what are the comparative merits of the claim of the Costers and that of the State Bank of Georgia.

From a careful inspection of the deeds and exhibits appended to the bill of the Costers, showing the objects and the various transactions of the company, we have come to the conclusion that the members of the association, constituting the "Oswichee Company," were partners so far as third persons were concerned. It is true, the partnership was a peculiar one; but still they were undoubtedly so far partners that the whole assets of the company would, in equity, be considered as pledged for the payment of the debts of the company, and the debts of third persons would have priority over the debts of its individual members.—Story on Part. §§ 606, 410, 77.

The evidence in the record, we think, necessarily induces the conclusion that the agent, Hamilton, had ample authority to borrow money for the company, and to pledge or mortgage the property of the company as a security for the faithful payment thereof. This authority has the names of all the members of the company at the time affixed to it, that of John G. Coster amongst the others. This authority was shown to the Bank by Hamilton at the time he borrowed the money, and was, according to the testimony, influential in causing the Bank to part with its money and make the loan. We think the inference entirely legitimate, from the bill of the Bank and the proofs upon the subject, that the Bank parted with its money upon the understanding that it was to have a lien of some kind upon the property of the company for its security, or a pledge of some kind of the property for the same object. Else why should

Hamilton have drawn up the paper in the form in which it now appears, and let it lie amongst his papers for several years without its being delivered. We consider then the fact as established, that the Bank loaned its money upon the faith of the property of the company, and not upon the credit of the individual members thereof, through whom the negotiation was effected; and so far as the members of the company are concerned, the Bank is to be considered a mortgagee of the property of the company for the security of their debt, and this on the principle, that equity will consider that as done which ought to be done. See Story's Equity 64 g.

This view would place the claims of the Bank of Georgia above those of the Costers, as the latter represent John G. Coster and the claims which they have paid as executors since the death of the said John G. In the view of the case that we have taken, we deem it entirely unimportant whether the counsel of the Costers, Mr. Johnson, is held to his admission that the paper, No. 6, which is one of the exhibits to the cross bill of the Bank of Georgia, and which purports to be the mortgage itself of the Bank, was executed and delivered at the time it purports to have been or not. We do not rest the claim of the Bank upon this admission, but upon the fact that the Bank trusted the company, loaned its money on the faith of the property of the company; and as between the Bank and the members of the company, equity will consider the Bank as mortgagees, with a lien upon the property of the company until its debt is paid.

We see no error, however, in the court's holding counsel to the admission which they had made relative to the execution of the paper in question; but, in our opinion, with or without such an admission, the law would have been the same. Our conclusion, therefore, is, that the Bank of Georgia, so far as its claim is concerned, as compared with the Costers, has the better right, and to that extent the Chancellor below correctly decided the law.

We next present the claims of the Bank of Georgia in juxtaposition with those of Hope & Co. and Carl Heine, with a view of determining their relative superiority.

It is contended on the part of the Bank of Georgia, that, inasmuch as the mortgage of Hope & Co. and Carl Heine was irregularly recorded, being acknowledged before the American consul in Amsterdam, and such an acknowledgment not authorizing

the same to be recorded, therefore it is to be considered in all respects, so far as the Bank is concerned, as unrecorded; and that being unrecorded, and subsequent in point of time to the mortgage of the Bank, it is a mere equitable lien upon the property, and therefore inferior to the lien of the Bank. To this it is replied, that the mortgage of Hope & Co. and Carl Heine is in all respects a regular legal mortgage; that its execution and delivery are perfect; its consideration *bona fide*, and that they, the mortgagees, loaned their money without any notice whatever of the mortgage set up by the Bank, and therefore claim that the penalty of nullity is denounced by the statute against the mortgage of the Bank, so far as Hope & Co. and Heine are concerned; and therefore they claim to hold priority, as between their claim and that of the Bank of Georgia.

We deem it of some importance to regard for a moment the forms of the two conveyances, under which Hope & Co. and Heine and the Bank claim. The instrument in writing under which the Bank of Georgia claims, and the circumstances attending its execution and delivery, make it an equity merely to have their debt paid out of the assets of the company, but it does not place in the Bank the legal title to the assets or any portion of the assets of the said company; whereas the mortgage of Hope & Co. is in all respects legal and regular, except that it is acknowledged before the American consul in Amsterdam. The granting clause of the mortgage is, "granted, bargained, sold, aliened, conveyed and released;" and it was regularly executed and delivered, but irregularly acknowledged and recorded. By the mortgage of Hope & Co. the legal title passed, and after the law day ejectment would lie. The question then arises, what is the effect of our acts of registration upon the two instruments by which Hope & Co. and the Bank of Georgia claim? and how do the said acts affect the one in reference to the other?

If we apply to them the act of 1823, (Clay's Digest 154 § 18,) we shall see that the penalty of nullity is pronounced upon the mortgage of the Bank, so far as respects Hope & Co. and Carl Heine. The language of the act is, that, as against "a subsequent *bona fide* purchaser, or a mortgagee for a valuable consideration, not having notice thereof," such deed or conveyance shall be void and of no effect. That Hope & Co. are mortgagees,

is undoubted. Their claim is based upon the technical bond and mortgage. This act of 1823 makes no requirement of the subsequent mortgagee, that he must record his mortgage, or stand in the same predicament as the first mortgagee with his unregistered mortgage. The act simply declares the first unrecorded deed void, as against the subsequent mortgagee, *bona fide*, and upon valuable consideration, where such mortgage is contracted without notice of the prior incumbrance. Suppose, then, the case of two mortgages of real estate, both regular upon their face, but neither recorded, and that the last has been contracted in ignorance of the existence of the first. Can there be any doubt that the last mortgage would override the first? We consider it plain, that it would. The second mortgagee, in not recording his mortgage, runs the risk simply of being overridden by some subsequent mortgagee or incumbrancer, and in that case the statute would declare the nullity of his mortgage, and prefer the subsequent one, as it prefers his to the previous one. A different rule would prevail, if the statute gave the preference to the mortgage first recorded; but that is not so, nor does the act require the second mortgage to be recorded at all, but it pronounces the second mortgage, on its execution and delivery, if executed and received in ignorance of the first mortgage, its superior. And we apprehend the result will be the same, if we apply to these instruments the act of 1828, which speaks of deeds of trust of personal property to secure debts. Under this act, a deed not recorded for 30 days, if of personal property, and for 60 days if of real estate, is pronounced void, as against creditors and subsequent purchasers without notice. Applying this act to the two deeds under which the parties claim, we cannot perceive any difference in the result. Hope & Co., it is conceived, are, under their mortgages, creditors, if not subsequent purchasers; and the nullity of the Bank mortgage, as to them, is as distinctly declared under this act as under the act of 1823, where we are disposed to think the deeds legitimately fall. The vice of the argument of the counsel in favor of the Bank of Georgia, consists in supposing that, the latter mortgage remaining unrecorded, the mortgages in that respect stand on the same level. Whereas the truth is, that the act itself, whether we apply to them the act of 1823 or the act of 1828, makes the first mortgage null and void so far as the second is concerned,

and neither act imposes upon the second mortgage the necessity of being registered in order to give it priority over the first. In this respect our acts are different from the acts of the State of New York and Virginia, on which is founded the decision in 2 Johns. Ch. 608, and 2 Lomax's Digest 366. These acts were copied from the 2d of Anne, chapter 4th, which, after describing the kind of conveyances to which it extended, and saying that the memorials of them should be registered in the manner directed, added, that "every such deed or conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such memorial thereof is registered as by the act directed before the registering of the subsequent deed or conveyance." The early registry acts of Virginia, and a portion of those of New York, contained clauses similar to the one quoted from the 2d of Anne, and making it necessary to have the second mortgage registered before nullity of the first mortgage is declared. The more modern acts of those States do not contain any such clause, and consequently the decisions in those States upon the effect of the registry acts upon the first conveyance, is to the effect that they are void as to the second, irrespective of the fact whether the second mortgage has been recorded or not.—19 John 281; 2 Lomax's Dig. 370; 17 Ohio 226; 6 Barb. S. C. R. 60; 1 Peters S. C. R. 552. This we think the true construction to give to our acts; so that whether we apply to the mortgage of the Bank of Georgia the act of 1823 or the act of 1828, that mortgage, so far as respects Hope & Co. and Carl Heine, would be void; and so far as this Bank is concerned, the position of Hope & Co. and Heine is in no respect changed from what it would have been if their mortgage had in all respects been recorded according to the statute. The only risk which they run in failing to record their mortgage properly, was as to subsequent creditors and *bona fide* purchasers without notice. The statute itself fixes their condition as to prior incumbrances, and the courts of the country, when called upon, must enforce it. Our conclusion, therefore, is, that Hope & Co. and Carl Heine have a lien superior to that of the Bank of Georgia, and are to be preferred to said Bank in the distribution of the funds of the company.

We have not thought proper, in this opinion, to dwell upon the

effect of the attachment and judgment obtained by the Bank of Georgia against James Hamilton individually, nor upon the effect of the judgment confessed by the counsel of the Oswichee Company, in favor of Hope & Co. Neither of these judgments, in our opinion, ought to have any material influence in the decision of the case. It is true, the legal title of the property was in James Hamilton, but the equitable title was in the members of the company; and under such circumstances, the lien acquired by the judgment must necessarily be subject to the equities already existing over the property.—1 Paige 279, 280; 4 *ib.* 9. For a similar reason, the judgment in favor of Hope & Co. v. the Oswichee Company could not be efficient as a lien, because the legal title to the land was in James Hamilton, and the judgment lien, as we understand it, only operates upon the legal title.

We have, therefore, placed our decision upon other grounds. Besides, if we could give to the attachment and judgment of the Bank of Georgia an effect superior to what we have done, it is still very doubtful if its position before the court would enable it to derive any benefit from it. The Bank filed a cross bill, and by that it is supposed to have made its case, by which it is willing to be judged. In that cross bill, its attachment and judgment are no where named or relied upon; and the only information the court has upon this subject, from the pleadings, is, that it is stated in the bill of the Costers, and confessed in the answer of the Bank to that bill. The Bank having undertaken to file a cross bill, and not setting up this attachment and judgment therein as one of the grounds upon which it relies for its superiority, how can it derive any benefit from it so far as Hope & Co. are concerned? As to the Costers' bill, to which the answer of the Bank was responsive, a different rule would perhaps prevail; but as against Hope & Co. and Heine, we apprehend the Bank would be confined to the case made by their cross bill. On this point, however, we make no decision; as we have already stated, our decision is placed upon other grounds. As to the effect of the judgment of Hope & Co., we do not deem it necessary to decide, because, even without that, we consider their lien superior to that of the Bank of Georgia, and consequently to that of all other parties before the court.

Our conclusion, therefore, is, that of the claims before the

court in this cause, that of Hope & Co. and Carl Heine stands first; that of the State Bank of Georgia, second; and lastly, that of the Costers, who only represent the stock of the company, or, in other words, who are themselves the stockholders. As to the claim of Washburn, we have already shown that it cannot be supported, and, as above stated, his bill is dismissed with costs. The decree of the Chancellor, so far as it is inconsistent with the views above expressed, is reversed, and so far as it is in accordance with them, it is affirmed. The cause must be remanded, with directions to the Chancellor to proceed with it, and distribute the funds in accordance with the views above expressed.

We think there was no error in the Bank of Georgia making Hope & Co. and Carl Heine parties to their cross bill. They had not been made parties, it is true, by the Costers, in their bill; but it is clear that they had a direct and very important interest in the litigation, and were important parties before the court. Under such circumstances, we apprehend it matters little at whose instance they are brought in. If it were necessary to have them before the court, the court would even order them to be brought in, in order to enable it to proceed to a final decree in the cause.

It is also objected, that the infant heirs of John G. Coster are not made parties in a legal mode, according to the rules of chancery practice. The will of John G. Coster is not set out, so that we cannot see whether these infants are necessary parties or not. Assuming that they are necessary parties, the third and forty-first Rules of Chancery Practice direct in what manner they shall be brought before the court. The record does not, in our opinion, furnish evidence that these requisitions have been complied with. We nowhere see in the record the evidence that the requirements even of the order of publication have been complied with, so far as these infants are concerned. If, therefore, the Bank should think it necessary to bring these infants formally before the court, we should feel compelled to decide that they were not so at present.—16 Ala. 509; 5 Ala. 158; 6 Ala. 452; 1 Ala. 373; Code 716. As the cause has to be remanded for errors in the main decree, we have deemed it important to say this much upon the point, as to the mode in which these infants have been brought before the court. In the future

proceedings before the Chancellor, the parties will have an opportunity to correct any errors of this kind which may be found to exist.

It but remains to add that Washburn must be taxed with the costs of this court and of the court below, so far as his bill and cross bill are concerned. He must also be taxed with his own costs in the cases of the Costers and the Bank. And the balance of the costs in this court, must be equally divided between the Bank of Georgia and the Costers, and also of the court below up to the present time; leaving the court below, however, free to make such disposition of the costs to accrue in the future proceedings in the cause, as shall be just and proper.

REPORTS

OF

CASES ARGUED AND DETERMINED

At January Term, 1854.

HARRISON *vs.* THE STATE.

1. In a case of homicide, to justify the killing, it is not sufficient that the deceased had the means at hand to effect a deadly purpose, but he must have indicated, by some act or demonstration, at the time of the killing, a present intention to carry out such purpose, thereby inducing a reasonable belief on the part of the slayer that it was necessary to deprive him of life to save his own; and if the evidence shows no such act or demonstration, no question on the law of self-defence arises.
2. If one man deliberately kill another, to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder.

ERROR to the Circuit Court of Clarke.

Tried before the Hon. JOHN. A. CUTHBERT.

ROBERT R. HARRISON, the plaintiff in error, was indicted for the murder of one George W. Gilbert; was tried and found guilty, and sentenced to the penitentiary for the term of his natural life.

A bill of exceptions was sealed at the trial, by which it appears that the deceased and Harrison were brothers-in-law; that some time previous to the killing a ditch had been dug by the deceased, some four feet deep, which drained a pond of water that otherwise accumulated on the land both of Harrison and the deceased, their farms lying contiguous; said ditch

allowing the water to flow off, through the land of Harrison, to the woods below, and had been kept open for that purpose about ten years; that on the day previous to the fatal occurrence, there came a heavy rain, and Harrison was seen, the same (Sunday) evening, at work on the edge of the ditch, and the next day it was ascertained to be stopped up by dirt being thrown into it; the result was, the corn of Gilbert, growing in the field, was overflown with water, as much as from one to four acres; that Gilbert sent his two small boys with hoes to open the ditch, so as to let the water pass off; that they proceeded to where it was filled up in the field of Harrison, and returned in a short time and reported that it was filled up to such an extent they could not open it; that the deceased then requested his wife to go and assist the boys, saying, at the same time, that "he did not wish to have any fuss or difficulty with Harrison"; that Mrs. Gilbert and the lads returned to the place, and commenced removing the dirt, when Harrison, who is the brother of Mrs. Gilbert, came, and began with a hoe to fill up the ditch, sprang across it, and struck one of the boys two slight blows with his hoe, one of the blows being upon the face; that the boy then started back to the house, and Harrison said, as he started, "If it is for guns you are going, I will go and get mine," and immediately ran to his house, about one hundred and fifty yards distant, and came back with his gun, saying to Mrs. Gilbert, "If Gilbert comes here I will kill him"; that the boy who went to the house informed his father, the deceased, that Harrison was at the ditch, and would not let them open it; Gilbert, who could see the parties from his house, replied, "It will not do to let the corn spoil, and we must go back and let off the water"; he then took his gun down from over the door, and the little boy took his gun, and they proceeded in an ordinary gait to the ditch; Gilbert came up within a few feet of Harrison, who was on the opposite side of the ditch, and with his gun on his shoulder stopped, looking at his wife, who was near by, and seeming to be about to speak to her, when Harrison discharged his gun at him, which taking effect, he instantly died. Harrison immediately started to run to his house, saying, "If you are not dead now, damn you, I will come back and kill you." The evidence further tended to show, that the opening of the ditch was a benefit to Harrison as well as to the deceased.

The court charged the jury as follows: "If, when Gilbert came armed to the ditch, Harrison had reason to believe that Gilbert was about to shoot him, and that Harrison's only safety was in taking the first shot, then the killing was in self-defence; but that this belief of Harrison must not rest on his fears only: it must be a well founded belief of a danger to his life, or of some great bodily harm, immediately at that time pressing on him."

The defendant's counsel asked the court to charge the jury, "that, if Harrison was in the possession of the land, and had closed up the ditch, Gilbert had no right to use force in opening it, although it might cause his land to overflow"; also, "that if Harrison had a well founded belief that Gilbert came into his field with his gun with the intention of doing him a bodily harm, then Harrison was not bound to wait for Gilbert to execute his intentions, but might act in his own defence." These charges the court refused to give.

The charge given, and the refusal to charge as requested, are now assigned for error.

Williamson, for the plaintiff in error, argued:

1. That the charge given was erroneous; that, if a man, though in no danger of serious bodily harm, through fear, alarm or cowardice, kills another, under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defence.—Granger v. The State, 5 Yerger 459; Wharton's Am. Crim. Law 590, 591, 592.

2. That the charges asked should have been given; that a reasonable apprehension of death, or of great violence to the person, will justify a killing in self-defence by the party assailed.—5 Yerger 459, *supra;* 11 Humph. 200; Oliver v. The State, 17 Ala. 587.

M. A. Baldwin, Attorney General, *contra*, insisted:

1. That both the charges asked were abstract, as there was no evidence that the deceased used force in opening the ditch, nor any circumstances from which it might be inferred that he came into the field with the intention to do Harrison a bodily harm.

2. That a bare belief, on the part of the slayer, is not suffi-

cient, unless the circumstances are such as induce him reasonably to think that another intends to kill him, or to do him some great bodily harm, immediately.—Oliver v. The State, 17 Ala. 599; The State v. Scott, 4 Iredell 415; The State v. Morgan, 3 Iredell 193; Wharton's Crim. Law 260.

CHILTON, C. J.—The charge which was given, when considered with reference to the facts set out in the bill of exceptions, was more favorable to the defendant than the law would authorize. There was no evidence that Gilbert was about to shoot Harrison, when the latter killed him: on the contrary, he was standing with his gun on his shoulder, and about speaking to his wife, when he was shot down, and this shooting was carrying out a threat made to the wife of Gilbert by Harrison, that he would kill him if he came there.

The law of self-defence, so far as the proof set out in the record shows the transaction, had nothing whatever to do with the case. Harrison, in the first instance, brought on the difficulty, by a most unneighborly and malicious act in stopping up the ditch, thus injuring himself in order to overflow the growing crop of the deceased. When it was attempted to be opened, he was there, throwing in the dirt, as the wife and children were engaged throwing it out: he inflicts personal violence upon one of the children with his hoe, and when the child left, he flies to his gun; and without necessity, and in the absence of any attempt or demonstration of an intention to injure him, on the part of the deceased, other than having his gun upon his shoulder, he deliberately shoots him down while in the act of speaking to his wife.—It was calculated to mislead the jury to charge on the law of self-defence under such circumstances, for they might well have inferred that the court would not give a charge which was abstract, and hence, that merely having a gun upon his shoulder, without more, put the life of the prisoner in imminent peril, justifying him in what he did. Such is not the law.

It was correctly said by Ruffin, C. J., in The State v. William Scott, 4 Iredell's Law Rep. 409, that "the belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to

execute his design, or, at least, is in an apparent situation to do so, and thereby induces me reasonably to think that he intends to do it immediately." The "situation" spoken of is, not that he has the means at hand for effecting a deadly purpose, but that, by some act or demonstration, he indicates at the time of the killing a present intention to carry out such purpose, thereby inducing a reasonable belief, on the part of the slayer, that it is necessary to deprive him of life to save his own.—Pritchett v. The State, 22 Ala. 39; Wharton's Crim. Law 260.

It is manifest, from what we have said, that there was no error in refusing the charges asked by the counsel for the defendant in the court below.

Whether Gilbert had or had not the right to use force in opening the ditch, was a question which did not arise upon the proof. It is perfectly clear that the prisoner had no right to take his life to prevent his opening it.—1 Russell on Crimes 663. If one man deliberately kill another, to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder.—State v. Morgan, 3 Iredell's Law Rep. 186; Commonwealth v. Drew, 4 Mass. 391; Wharton's Crim. Law 258.

As to the last charge asked and refused, it is fully covered by what we have said as respects the charge given.

There is no error in the record, and the sentence of conviction is affirmed.

McELHANEY *vs.* THE STATE.

1. When the bill of exceptions does not set out all the evidence, the Appellate Court will not presume that an affirmative charge was abstract, but, on the contrary, that it was fully warranted by the proof.
2. When an indictment charges the defendant with "harboring *and* concealing" a runaway slave, he may be convicted on proof of either harboring *or* concealing.
3. The terms "harbor" and "conceal," as used in the fourteenth section of the

fourth chapter of the Penal Code, (Clay's Digest 419 § 14.) are descriptive of two offences: a person may be convicted of "harboring," on proof that he, knowing the slave to be a runaway, fed her, or furnished her with shelter and the like, to enable her to remain away from her master, or to deprive her master of her service, although he may not have "concealed" her.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

DANIEL CHANDLER, for the appellant:

1. The indictment charged that the defendant "harbored *and* concealed" the slave. The charge of concealing was a substantive, descriptive, material one, and ought to have been proved as laid.—Roscoe's Crim. Ev. 107, 109. But the proof showed that the slave was not concealed, but was "frequently in the street, so that McElhaney's neighbors often saw her out and about, and she seemed to come and go as she pleased": the evidence, therefore, did not sustain the allegation.

2. The second part of the charge was abstract: there was no evidence that the defendant "supported and entertained" the slave, or "furnished her with a house, a place of residence," or that he even knew she was on his premises; the only fact disclosed by the record, is, that "it appeared that the slave had been at McElhaney's all the time she had been run away."—How can this court determine whether the facts authorized the charge? The presumption is, that there was no such evidence. —12 Ala. 149.

3. The court erred in its definition of "what constituted the act of harboring." The definition of the term "harbor," according to Webster, is: "1. To shelter, to secure, to secrete; as, to *harbor* a thief. 2. To entertain, to permit to lodge, rest or reside; as, to *harbor* malice or revenge; *harbor* not a thought of revenge. 3. To lodge or abide for a time, to receive entertainment; as, 'This night let's *harbor* here in York,'—Shak." In an indictment, the term can have but one meaning, as the illustrations given show: "to shelter, to secure, to secrete,"—all imply secrecy, concealment. If a thief is "seen frequently in the streets, so that all the neighbors see him out and about, and seems to come and go as he pleases," could it be said that he was *harbored?*

M. A. BALDWIN, Attorney General, *contra*.

CHILTON, C. J.—The appellant was indicted under the fourteenth section of the fourth chapter of the Penal Code, which is as follows: "Every person who shall hereafter harbor or conceal any runaway slave or slaves, or fugitives from their masters, or other person having charge of them, knowing that they are such, such person, so offending, shall, on conviction, be fined not less than one hundred dollars, and not more than one thousand dollars, or be imprisoned in the penitentiary not more than two years, at the discretion of the jury trying the same."

The court charged the jury, that they must be satisfied that the slave was a runaway, and that McElhaney knew of that fact, and, so knowing it, harbored her; that the State did not insist upon the charge of concealing the slave; that to constitute the act of harboring, it was sufficient if McElhaney, knowing her to be a runaway, supported and entertained her, or provided her with a home or place of residence, although she did "go about in the streets, and was seen by the neighbors." To this charge the defendant excepted, and this exception presents the only question for our revision.

1. It is argued, that the proof did not warrant this charge; but it will be observed that the charge is affirmative, and all the proof is not set out. The rule in such cases is well settled, that we will not presume that such charge was abstract, but, on the contrary, that the proof fully warranted the charge.

2. But it is argued, that the indictment is for harboring *and* concealing, and that the charge warrants a conviction for harboring merely.

The statute uses the terms in the disjunctive, "harboring *or* concealing," and if the defendant is guilty of either, the offence is made out; but we know of no case, which holds that the State is bound to prove both, in order to warrant a conviction of either, although both are charged. In Mooney v. The State, 8 Ala. 328, the indictment charged that the prisoner did, unlawfully and feloniously, inveigle, steal, carry and entice away two negro slaves: *held*, that, although these were charged in the same count, the State was entitled to convict the prisoner on proof of either. See, to the same point, Ben v. The State, 22 Ala. 9; The State v. Murphy, 6 *ib.* 846; Wharton's Am. Crim. Law 165.

3. But it is further contended, that the charge is wrong,

because it allows the jury to find a harboring without concealing. It is certain, whatever meaning lexicographers may attach to the term "harbor," that the legislature intended, in the statute before us, to make two offences, the one harboring, the other concealing a runaway slave, knowing such slave to be runaway, &c. The plain object was, to withhold from slaves inducements either to run away, or to prevent their return to their masters after they had run away, by inhibiting all persons from sheltering, supporting, keeping, or protecting them, in such manner as that they could live apart and independently from their masters. Although the prisoner may not have concealed the slave, yet if, knowing her to be a runaway from her master, he fed her, or furnished her shelter and the like, he is guilty of a violation of the statute, if this was done to enable her to remain away from her master, or to deprive him of her service. This charge, taken in connection with the last charge given, very fully lays down the law, and, we think, is wholly free from error.

Let the judgment be affirmed.

BARRETT *vs.* THE STATE.

1. In a case of assault and battery, fourteen witnesses were summoned by the State to sustain the character of the prosecutor, but none of them was called on the trial, the prosecutor having died two or three months previous thereto: *Held*, that the defendant, having been convicted, should be taxed with the costs of their attendance, it not being shown that they were summoned after the death of the prosecutor, nor that his death was known to the solicitor.

ERROR to the Circuit Court of Bibb.

Tried before the Hon. NATHAN COOK.

WALTER BARRETT, the plaintiff in error, was convicted at the Spring term, 1853, of the Circuit Court of Bibb, of an assault and battery on one Thomas Muse, and was fined $75.

On a subsequent day of the term, he moved the court to exclude from the bill of costs taxed against him the items taxed for the subpœnas and attendance of fourteen witnesses, and showed, in support of his motion, that not one of them was examined on the trial, although they were all subpœnaed by the State, and were in attendance on the court during the trial. "The State, by its solicitor, then showed that said witnesses were subpœnaed for the purpose of sustaining the character of the prosecutor, Thomas Muse, and that they were summoned by leave of the solicitor. The defendant showed, in reply, that said Muse had been dead two or three months before the present term of the court. On these facts, the defendant moved the court to exclude the costs and fees of said witnesses from the bill of costs; but the court overruled the motion, and ordered said costs to be taxed against said defendant; to which decision of the court said defendant excepts," &c.

I. W. Garrott, for the plaintiff in error, contended, that the costs of the attendance of these witnesses should not have been taxed against the defendant; that the State was bound to know and take notice of the death of the prosecutor, and should have discharged its witnesses; that the defendant could not have discharged them, and should not be held responsible for the consequences of the State's failure; that witnesses could not be called to sustain the character of a prosecutor merely, as he was not necessarily a witness. He cited Marshall v. Layton, 2 Harr. 344; Dean v. Williams, 6 Hill's (N. Y.) R. 376; Dowling v. Bush, 6 Howard's Practice R. 410; Taylor v. McMahan, 2 Bailey 131.

M. A. Baldwin, Attorney General, *contra*:

1. A party has the right to call as many witnesses as he deems necessary to support his case. No general rule is laid down, in criminal cases at least; and the court will not interfere, unless there is evidence of oppression. All witnesses summoned are entitled to pay, whether examined or not.—1 Binney 46; 11 Pick. 241; 2 Bailey 131; 3 Har. & McH. 101; 3 Yeates 558.

2. Our statute does not limit the number of witnesses in criminal cases, as in civil cases.—Code §§ 3568, 3569. In

civil cases there is no limit, where the witnesses are summoned, as in this case, to sustain character.—*Ib.* § 2393.

8. The bill of exceptions does not show that the death of the prosecutor was known to the solicitor before the trial.

GOLDTHWAITE, J.—There is no ground disclosed by the record, which would have authorized the court below to give any other judgment than it did, as, in the absence of anything appearing to the contrary, we must suppose that the law was complied with, and that the witnesses to which the motion referred, were either marked upon the indictment, or directed to be summoned by the solicitor, under section 3561 of the Code.

The fact that the record shows that they were summoned to sustain the character of the prosecutor, and that he was dead before the trial, does not affect the question, as it does not appear that they were summoned after his death, nor that that fact was known to the solicitor. The Code (§ 2392), in civil cases, authorizes the summoning of more than two witnesses to defend the reputation of a witness or party; and, in other cases, rests it with the discretion of the court, to determine whether the circumstances of the case warranted the summoning of more than that number to the same fact. In criminal cases, the law has invested the solicitor with the discretion of directing the clerk to summon such witnesses as he may think the interest of the State demands, although not marked upon the indictment, (§ 3561,) and even if he abused that discretion, we incline to the opinion, that the witnesses attending in obedience to the subpœna would be entitled to their pay; here, however, there was no pretence of the kind, and the motion was properly overruled.

Judgment affirmed.

TUCKER *vs.* THE STATE.

1. Under an indictment for selling spirituous liquors to a free person of color, the State may prove the *status* of the person to whom the liquor was sold by evidence of hearsay and general reputation.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. TURNER REAVIS.

THE appellant, John C. Tucker, was indicted for selling spirituous liquors to "one Dade Massey, a free person of color." On the trial, as appears from the bill of exceptions, "several witnesses were introduced, who stated, that they had known said Dade for a long time; that he has acted and been recognized as a free man, residing in the State of Alabama for more than twenty years, and in Greene County two years; that, from hearsay and general reputation, they had always considered him a free person; that they did not know that he was born free, or descended from free parents, or whether he was manumitted; but that all they knew of his being free was, from hearsay or general reputation, and from his acts and his being recognized as free." The defendant objected to this evidence, but his objection was overruled, and he excepted.

WM. F. & J. G. PIERCE, for the appellant:

A person of color, in this State, is presumed to be a slave.—Field v. Milly Walker, 17 Ala. R. 80. And this decision is supported by the various statutes regulating the manner of emancipation. The rule is universal, equally applicable to criminal and civil cases, that the best evidence the nature of the case admits of must be adduced.—2 Mason 464; 6 Peters 352; 14 Peters 431; Ala. Rep. Evidence of hearsay and general reputation is only admissible as to pedigree, but not to establish freedom.—Davis *et al.* v. Woods, 1 Wheat. 6, and cases there cited; 5 Ala. R. 361; 11 Ala. R. 720. The best and only evidence of the freedom of a colored person, in this State, is, a certificate, deed or will of manumission, or proof of

descent from free parents; the latter of which cannot be resorted to, until the impossibility of obtaining the former is accounted for by the State.—5 Ala. R. 357. Such testimony, clearly, would not be allowed under a petition for freedom, for the purpose of establishing freedom, or even the freedom of one's ancestors.—1 Wheat. 6. Much stronger the rule, then, when applied to cases arising under penal statutes, where the strictest proof is required. In the construction of penal statutes, we are not allowed to conjecture what may have been the intention of their framers: they must, in all cases, be strictly construed.

M. A. Baldwin, Attorney General, *contra*:

Although hearsay or general reputation is sufficient to prove pedigree, yet the authorities are conflicting, as to whether it is admissible, in a suit for freedom, to prove the *status* of a party. 7 Cranch 295; 1 Wash. 123; 4 Rand. 621; 2 Wash. 64; 1 Hen. & Mun. 388. But in a collateral issue of this sort, the State should not be held to as strict and direct proof, as in a suit for freedom; hearsay should be admitted from necessity; it is the highest evidence of which the nature of the case admits. In most cases, it would be impossible to adduce any other kind of testimony; no documentary evidence, perhaps, may exist; the person may have been born in a distant country.

But the circumstance that the boy Dade had enjoyed freedom for twenty years, and had been recognized as such among his neighbors, is, of itself, sufficient evidence of his freedom.—The State v. McDonald and Armstrong, Coxe's (N. J.) R. 332; Naylor v. Hays, 7 B. Mon. 478. He was proven to be a person of color; a person of color is an admixture of the white and black races, and is generally called a mulatto.—The State v. Davis *et al.*, 2 Bailey's (S. C.) R. 558. Although there is a presumption of slavery arising from a black color, yet there is none arising from a mulatto color.—Scott v. Williams, 1 Dev. 376.

CHILTON, C. J.—The only queston presented by the record in this case is, whether upon an indictment for vending spirituous liquors to a free person of color, under the statute, it is competent for the State to prove the *status* of the person to

whom it was sold by showing that he was a man of color, and for more than twenty years had acted and been esteemed in the community as a free person; and that according to hearsay and general reputation he was a free person of color.

We are not called upon to express any opinion as to whether, in a direct proceeding for freedom, hearsay or general reputation could be properly received: that is not the case before us. The inquiry as to the condition of the party to whom the spirituous liquors were sold, arises collaterally, and does not call for the same strictness of proof, perhaps, as if the question of freedom were directly involved.

We agree with Mr. Attorney General, that, from the necessity of the case, hearsay evidence or reputation as to the *status* of the party must be received in prosecutions of this kind; for, in most cases, it would be impossible to adduce other evidence. If the State must send out in search of documentary evidence of manumission, or is required to trace the genealogy of the party, who may have been born in a distant country, it is manifest that the statute alleged to have been violated would, in a great measure, be rendered nugatory.

The proof shows, *prima facie*, that the person to whom the spirituous liquors were sold, was a free person of color: he was generally reported to be such—had acted and been recognized as such for more than twenty years in the community, and the selling of liquors to him fell ostensibly within the mischief intended to be remedied by the statute.—7 B. Monroe 478. Neither do we see any injustice or hardship, which can result to to defendants from the practical operation of the rule we have laid down; for if they sell spirituous liquors to colored persons, they must be aware that they either sell to slaves, and thereby commit a much higher offence than the one now under consideration, or that they sell to free persons of color.

The court is of opinion that the proof was properly admitted, and the judgment of conviction must be affirmed.

HALE ET AL. *vs.* THE STATE.

1. Under the act establishing courts of probate, a judge of probate has power (now taken away by the Code) "to grant, hear and determine writs of *habeas corpus*" where the petitioner was confined in jail under a charge of grand larceny.

ERROR to the Circuit Court of Blount.

Tried before the Hon. B. W. HUNTINGTON.

B. T. POPE, for the plaintiffs in error.

M. A. BALDWIN, Attorney General, *contra*.

CHILTON, C. J.—Elijah Hale was indicted for grand larceny, and being confined in jail upon a *capias*, issued from the Circuit Court of Blount, sued out a *habeas corpus* before the judge of probate, and was discharged from custody, upon entering into a recognizance in the sum of five hundred dollars, with William and Allen Hale as his sureties, conditioned for his appearance at the March term of the Circuit Court to be held for said County of Blount, A. D. 1852.

Having forfeited his recognizance by failing to appear, judgment *nisi* was rendered against said Elijah and his sureties, and a *scire facias* thereupon issued, which was executed on the sureties, who, at the term to which they were cited, appeared, craved oyer of the recognizance, and demurred. The court overruled the demurrer, and rendered judgment final against the sureties, which is now assigned for error.

The eleventh section of the act establishing courts of probate empowers the judges of these courts "to grant, hear and determine writs of *habeas corpus*, in all cases in which judges of the courts may." This language is unambiguous, and leaves no ground for construction. These judges have the same power which "the judges of the courts had" over this subject; and, as the power before and at the passage of the act was clearly given to the circuit judges and chancellors, the same power is vested in the probate judges by this act. We concede that it

was an improvident provision, and are pleased to find that the Code takes away the power.

As to the other point, that Elijah Hale, the principal, was not served with the *scire facias*, we find, upon looking into the record, that the judgment was only made final as against the parties who appeared and demurred to the *scire facias*. As to them, the judgment is correct, and must be affirmed.

Judgment affirmed.

VAN DYKE *vs.* THE STATE.

1. The question whether the State can commence a suit by attachment, cannot be raised by a demurrer to the declaration.
2. The Comptroller of Public Accounts, in this State, has no authority to receive payment of moneys due to the State; and a payment to him, being unauthorized and invalid, does not discharge the party making it from responsibility to the State.
3. When an agent pays the money of his principal to a person who is not authorized to receive it, the principal may sue the receiver in assumpsit for money had and received; but the bringing of such an action is a ratification of the payment, and discharges the agent from all further responsibility.
4. A payment to the Comptroller, of moneys due to the State, can only be ratified by the sovereign power of the State: a suit cannot be instituted against him for its recovery, in the name of the State, by the direction of the Governor.

ERROR to the Circuit Court of Tuskaloosa.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by the State of Alabama against the plaintiff in error, Jefferson C. Van Dyke, late Comptroller of Public Accounts; the suit being commenced by attachment, in November, 1851. The defendant craved oyer of the attachment, bond and affidavit, and demurred to the declaration. The demurrer was overruled, and he then pleaded the statute of limitations; and a demurrer to this plea being interposed and sustained, he pleaded *non assumpsit*.

On the trial, the plaintiff read the statute abolishing taxation

and directing the expenses of the government to be paid by the State Bank and its Branches, and proved, by written testimony, that the defendant received from the Branch Bank at Huntsville, in the year 1842, the sum of $6,220 45, of the funds due from said Branch Bank to the State under the statute referred to. Plaintiff then introduced three receipts, each signed, "J. C. Van Dyke, Com. Pub. Accts.," of which the following are copies :

"Received of John H. Gee four thousand dollars, to be placed to his credit for taxes from the County of Sumter for the year 1846. Feb. 24, 1847."

"$21,065. Comptroller's Office, Jany. 8, 1847. Received of A. C. Walker twenty-one thousand and sixty-five dollars, being a partial payment of the taxes due from Mobile County for the year 1846."

"$1,585. Comptroller's Office, Jany. 8, 1847. Received of A. C. Walker fifteen hundred and eighty-five dollars, being a full payment for the licenses issued in Mobile County for the year 1846."

This being all the evidence offered, the defendant requested the court to charge the jury, that it was not sufficient to authorize a recovery against him for any of the items ; he also asked separate charges to the same effect, in relation to each particular item. These charges the court refused to give, and instructed the jury, that the evidence made out a *prima facie* case on the part of the plaintiff. The defendant excepted to the charge given, and to the refusal to charge as requested; and he now assigns for error the overruling of his demurrer to the declaration, the charge given, and the refusal to charge as requested.

E. W. Peck, for the plaintiff in error :

1. Can the State become or be made party to a suit at law, unless the right or power is given, either by the constitution, or by some law made in pursuance of it? The State is a mere political entity, and, of itself, has the power of neither volition nor action : it can will and act only through or by the instrumentality of public agents or officers, who can only act for it in the cases provided, and in the manner prescribed; and the courts will judicially take notice

who these public agents and officers are, and in what cases they may act for the State and bind it. This being so, no plea to the jurisdiction, or in abatement, was necessary to bring the question to the consideration of the court, in a case where there is no law to authorize the State to bring the suit. There is no provision in the constitution, nor is there any statute, authorizing the State to sue at the time this suit was brought, except the statute providing the mode of collecting the public revenue.— Clay's Digest 244 § 16.— Provision, however, is now made by the Code (§ 2137.)

2. But if the State may sue, it cannot sue by attachment. The State is not bound by a statute, unless expressly named; why, then, should it have the benefit of a statute, unless named in it? The remedy by attachment is an extraordinary remedy: it is not intended for the benefit of all persons, but only for certain persons, and only for them in certain cases. The State is not named; and the entire scope and objects of the several statutes show, that the remedy was not intended for the benefit of the State.—See § § 9, 31. As the declaration shows, on its face, that the suit was commenced by attachment, the defendant was entitled to the benefit of this objection on demurrer. The object of a plea is, to put upon the record a defence, or to make an objection to the declaration for a cause, which is not patent on the face of the declaration itself. If a suit be brought in the name of a dead man, it cannot be maintained; but if the fact of his death does not appear, it must be pleaded, and may be by plea in bar; but if the declaration states the fact of the plaintiff's death, it certainly would not be necessary to plead it.—Jenks v. Edwards, 6 Ala. 143, and authorities there cited.

3. But, if the State might properly sue in this case, and by attachment, yet the evidence fails to show any right on its part to a judgment. The money received by Van Dyke from the Huntsville Bank, was not the money of the State, but of the Bank who drew the draft: the Bank drew the draft under the mistaken belief that he, as the agent of the State, was authorized to receive it for the State; but this not being true, it was money in his hands for the use of the Bank, who might at once have instituted suit against him for

its recovery. The State might have elected to ratify the payment; and such election and ratification, legally made, would have made the payment lawful, and consequently discharged the Bank from all liability to the State, to the extent of that payment. But such an election and ratification could only have been made by an act of the legislative department of the government, that is, by some statute declaring such election and ratification, or authorizing some person, agent or officer, to make such election and ratification on its behalf. Such election and ratification have never, to this day, been made.

Again; such election and ratification should have been made within a reasonable time, that is, before suit brought by the Bank to recover the money from Van Dyke; for, as it was money in his hands for the use of the Bank, no election and ratification after suit brought by the Bank could defeat its recovery. But if no such suit was brought by the Bank, such election and ratification should have been made before the Bank's right of action was lost by the operation of the statute of limitations.

ORMOND & NICOLSON, *contra:*

1. The State may sue, at common law, or in chancery, in its own courts, or in the courts of another State, not only in virtue of its common law prerogative of sovereignty, but also because it is a corporation, the highest known to the law. This position, which cannot be seriously questioned, is sustained by the following authorities: United States v. Buford, 3 Peters 30; The State of Illinios v. Delafield, 8 Paige 527; 5 Bacon's Abr., tit. Prerogative, E, 7; Story on Constitution §§ 1273, 1274.

It may also sue by attachment, as that is only a different mode of bringing the defendant into court.—P. & M. Bank v. Andrews, 8 Porter, 404

3. But this objection cannot now be raised; it could only have been made by plea in abatement.—Cain v. Mather, 3 Porter 224; Roberts v. Burke, 6 Ala. 348; Loomis v. Allen, 7 *ib.* 706; Thompson v. Hair, 7 *ib.* 313; Jordan v. Hazard, 10 *ib.* 221; Jackson v. Stanly, 2 *ib.* 326; Calhoun v. Cozens, 3 *ib.* 21. Nor is the question open, whether the State can

sue in any form: that question could only be raised by a plea to the disability of the plaintiff, which is the first plea in the order of pleading; and any subsequent plea, of law or fact, admits the ability of the plaintiff to sue.

4. The State, then, in the present condition of the pleadings, is like any other individual, who, if his agent pays money to one not authorized to receive it, may elect to sue the receiver; and in such case, no other question would arise, than whether the money belonged to the plaintiff. Van Dyke, being merely the medium through which the money was to be transmitted, became liable, upon his failure to pay over the money, to the action of assumpsit.—Hitchcock v. Lukens, 8 Porter 338; Hall v. Marston, 17 Mass. 575; Jones v. Hoar, 5 Pick. 285; Wilson v. Smith, 3 Howard's (U. S.) Rep. 763.

5. A judgment against Van Dyke does not preclude the State against the Bank.—Sledge v. Tubb, 11 Ala. 383.

GOLDTHWAITE, J.—The question as to the right of the State to commence a suit by attachment, we think, is not presented by the record before us. Under our decisions, it is well settled, that, upon a demurrer to the declaration, the defendant cannot raise the objection that he is not regularly before the court.—Findlay v. Pruit, 9 Port. 195; Palmer v. Lesne, 3 Ala. 741; Griffin v. The Bank of the State of Alabama, 6 *ib.* 908; Jordan v. Hazard, 10 *ib.* 221. In the case of Jordan v. Hazard, *supra*, the suit was commenced by attachment, and the defendant craved oyer of the original writ, and demurred, upon the ground that the attachment was sued out for a cause not warranted by the attachment law. The case was elaborately argued, and the court declined to consider the question which was attempted to be raised, for the reason that it was not presented by the demurrer, which brought to view the declaration only, and did not authorize an examination into the validity and legality of the attachment. The principle upon which these decisions rest, is applicable to the case under consideration. The object of the law in relation to original attachments, considered with reference to the pleadings, was, to provide the means by which, in certain cases, it was allowable to

bring the defendant into court; and he could not, by a demurrer to the declaration, inquire into the regularity or legality of the proceeding through the medium of which that object was accomplished. As the State had a clear right to sue, (Cox *et al.* v. U. States, 6 Peters 172; Story on the Constitution § 1274,) and as the declaration contained a substantial cause of action, the demurrer was correctly overruled.

On the trial, it was proved, that Van Dyke received from the Branch Bank at Huntsville upwards of six thousand dollars, due from that corporation to the State under the statute abolishing taxation, and directing the expenses of the government to be paid by the State Bank and its Branches; that he also received from the tax collectors of Mobile and Sumter Counties, certain sums on account of taxes due to the State from those counties, and that the money was received by him during the period he was Comptroller of Public Accounts. The court was requested to charge, that the evidence as to each and all these items was insufficient to authorize a recovery; and the refusal to give these charges, presents the question whether, upon the law applicable to the case, the State upon this evidence was entitled to recover.

In the case of The Governor v. Walker, 22 Ala. 118, we held, that the Comptroller was simply the accounting officer of the government, and that, in the absence of any special authority given by law, payments of the public dues made to him were unauthorized and invalid. It can make no difference, in principle, whether the amounts which he received were considered as payments by the parties, or whether the money was simply deposited in his hands, to be paid by him into the treasury: in neither case did the law confer upon him the authority to receive it; and, under the decision we have referred to, the liability of the Bank in the one case, and the tax collector and his sureties in the other, continued, until they had absolved themselves from responsibility by the payment of the State's dues to the public treasurer, who was the only person authorized by law to receive them.

When an agent pays the money of his principal to a person who has no authority to receive it, the principal, it is true, can recover the amount thus paid of the receiver, in an action for

money had and received; but this action can, in such a case, only be maintained on the ground of the confirmation of the payment.—Billon v. Hyde, 1 Atk. 128; Smith v. Hodson, 4 T. R. 211; Hovil v. Pack, 7 East 164; Conn v. Penn, 1 Pet. C. C. R. 496; Ferguson v. Carrington, 9 B. & C. 59; Copeland v. Mer. Ins. Co., 6 Pick. 198; Paley on Agency (by Loyd) 122, and note; *ib.* 172, 173. The bringing of an action for money had and received, against the receiver, amounts to a ratification, and has the same effect upon the agent, as if he had an original authority; (Conn v. Penn, *supra*; Story on Agency § 244, and cases cited;) and, therefore, operates to discharge the agent from the consequence of his act to the principal.—Story on Agency § 243, and cases there cited. The case of Sledge v. Tubb, 11 Ala. 383, seems to maintain a different doctrine; but the positions we have asserted have been too long recognized, and rest upon too firm a basis of principle and authority, to be shaken.

Applying these principles to the case before us, it is obvious that a ratification by the State of the act of the Bank, or the tax collectors, in making the payments to or deposits with Van Dyke, is an essential requisite to the support of the present action. In the language of Judge Story, (Story on Agency § 259,) "the suit would not, on any other ground, be maintainable," and it is equally true, that a ratification of these acts, must discharge both the Bank and the tax collectors from their liability. The question is, can the State ratify these acts, without a law to that effect. If it cannot, it follows, necessarily, that, if no such law exists, a suit which can only be maintained on the principle of ratification cannot be sustained at all. We have seen from the case of Walker v. The Governor, *supra*, that the payment of this money to Van Dyke was unauthorized. In that case, the suit was against a tax collector who had paid a portion of the money sought to be recovered to the same person who is the defendant below in the present suit, and taken his receipt for the money thus paid. The receipts were received by an agent appointed by the Governor, to be used as evidence against Van Dyke in the present suit. It was insisted that this was a ratification by the State of the payments made by the tax collector to Van Dyke. The court, upon this point, say: "As to the ratification by the State of the pay-

ments made to Van Dyke: The authority to receive the public revenue could only be conferred upon the latter by law; and if the law did not confer this authority, no officer or agent of the State could do so; and if no officer could authorize the payment, none could afterwards affirm it. It could only be done by the sovereign power of the State." No statute has been passed confirming the payment to the plaintiff in error of the money which the evidence shows this suit was brought to recover: the State has conferred the power of ratification upon no officer, and in the absence of authority to confirm, an action depending upon the confirmation cannot be maintained.

It may be necessary to notice, very briefly, the argument that the right of the State to sue being conceded, it stands with reference to that right upon the same ground as an individual, and, as the latter may elect to sue the party receiving the money, the State may make the same election. An individual has the right to ratify the unauthorized act of his agent, in any way he may select: all that is necessary, is, that he should manifest his assent to the act. The State can ratify by the law alone. The Legislature has declared, in effect, that the public revenue shall be paid to the public treasurer, and the State must act in obedience to its own laws. If this suit can be maintained, the law which requires these payments to be made to that officer, is changed,—an unauthorized payment made to another individual is legalized, and, in the particular instance, the law is repealed and abrogated, without the action of the Legislature.

As our decision on this point must be decisive of the case, it is unnecessary to meet any of the other questions presented by the record. The court below, upon the evidence, should have charged that the plaintiff could not maintain the action.

The judgment must be reversed, and the cause remanded.

BOLTZE *vs.* THE STATE.

1. An administratrix who has possession of a slave belonging to her intestate's estate, is his mistress, within the purview of the statute against selling or delivering spirituous liquors to a slave without an order in writing signed by his "master or overseer.—Code § 3283.
2. An order in writing signed by a person who is neither the master nor overseer of the slave to whom the liquor was sold, is no protection to the seller.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN GILL SHORTER.

BELSER & RICE, for the appellant.

M. A. BALDWIN, Attorney General, *contra*.

CHILTON, C. J.—The appellant, Michael Boltze, was indicted for selling or delivering spirituous liquors to a slave, named Jim, the property of Martha Farley, without an order in writing, signed by the mistress, master or overseer of said slave. The State having proved the delivery of the liquor to the slave on the night of a particular Sunday, the defendant proved that he was acting as clerk for Henry Boltze, who owned the establishment, and who had instructed and prohibited him against a violation of the law in selling liquors to slaves. He further proved, that the slave was the property of the estate of John P. Farley, but was in possession of Martha Farley, who was administratrix of said estate; that when the liquor was delivered to said slave, he brought an order signed by one J. P. Jackson, requesting Henry Boltze to send him two gallons of whiskey by the boy, who had the money to pay for it. Jackson, who wrote the order, proved, that he had sent the slave for it, and that the boy brought the same across the street and delivered it to him.

1. This being all the evidence, the court was asked to charge, that, if the jury found that the slave to whom the liquor was delivered belonged to the estate of John P. Farley, and was

in possession of Martha Farley only as administratrix of said estate, they must find for the defendant. This charge the court refused to give, and we think very properly; for Martha Farley was, as the representative of the deceased, the legal owner of the slave for the purposes pointed out by the law, and is his mistress within the purview of the statute.—Code § 3283. She was the party entitled to his possession and control, and, if taken from her possession, she may maintain an action in her own name, without describing herself as administratrix, for his recovery, (10 Bacon's Abr. by Bouv. 134; 9 Leigh 158; 8 Por. Rep. 303; 2 Greenl. Ev. p. 325, § 338, n 1; Walker v. Laudeidale, 17 Ala. Rep. 359;) and if the slave had been stolen from her, it would have been sufficient to charge in the indictment that the slave was her property.—13 Ala. R. 156; 2 Russ. on Cr. 159.

The second and third charges were properly refused. The second assumes, that the vendor of ardent spirits may deliver liquor to a slave upon the written order of any one, whether he has any control over the slave as master or overseer or not; whereas, the statute expressly declares, that "Any person who sells, gives, or *delivers* to any slave any vinous or spirituous liquors, except on an order in writing signed by the *overseer* or *master* of such slave, specifying the quantity to be sold, given, or *delivered*, must, on conviction, be fined not less than fifty dollars."—Code, p. 590, § 3283.

The third charge is not only liable to the objection taken to the second, but to the further objection that it is abstract. It was: "That, if Jackson sent an order for the liquor by the negro to the defendant, and the latter merely sent it across the street to him, then they could not find the defendant guilty." There was no evidence that the defendant sent it to Jackson at any particular place. "He delivered it to the slave," says the proof, "upon Jackson's order;" the statute says he shall only deliver it upon the order in writing of the "overseer or master," specifying the quantity. Jackson is not shown to have been either the overseer or master. The defendant was, then, guilty of a violation of the statute.

Judgment affirmed.

Ex Parte PICKETT.

1. The Supreme Court will take original jurisdiction of an application, by a member of the House of Representatives, for a *mandamus* against the Speaker of said House, to compel him to certify to the Comptroller of Public Accounts the amount to which the petitioner is entitled, as a member of said House, for mileage or *per diem* compensation.
2. The General Assembly, by a joint resolution of both Houses during its regular session, having adjourned on the 20th of December, 1853, to meet again on the 9th of January, 1854, a member who went home and returned during the recess, is entitled to mileage, but not to *per diem* compensation during the recess.

Application for a *mandamus*, by Richard O. Pickett, who was at the time a member of the House of Representatives, from Lawrence, against William Garrett, the Speaker of said House, to compel him to certify to the Comptroller of Public Accounts the amount to which the petitioner was entitled, for mileage, or *per diem* compensation, or both, accruing to him during the recess of the General Assembly, between the 20th of December, 1853, and the 9th of January, 1854. The Speaker admitted the facts stated in the petition, and consented that the court should, without further notice or delay, decide upon and allow such writ or relief as the petitioner might be entitled to. The facts upon which the petitioner bases his application, are set forth in the opinion.

Samuel F. Rice, for the petitioner, submitted the case without argument on the merits, and argued only the question of jurisdiction. He furnished the subjoined brief of his argument:

1. The Speaker, in performing the duty imposed on him by § 45 of the Code, is both a ministerial and a judicial officer. The law itself determines that compensation shall be made to each member, and fixes the rule, in § 43 of the Code, by which the amount of that compensation shall be ascertained; and thus far, the Speaker must act as a ministerial officer. But the law does not determine how many days a member may have attended, nor whether he has been detained by sickness, nor how

many miles he may have travelled to and from the General Assembly; in these matters, not definitely fixed by the law itself, the Speaker acts judicially; for, if a member should claim too much travel, or too many days' attendance, the Speaker might rightfully refuse to certify for such excess, and might reject and disallow it.

The Speaker may then be regarded as an "inferior jurisdiction," within the meaning of the 2d section of the 5th article of our State constitution; but in no other sense is he to be considered as such "inferior jurisdiction. His jurisdiction is "inferior" in this matter of compensation, to the Supreme Court, but not to the Circuit Court. And but for this provision of the constitution, his jurisdiction in that matter would not be inferior even to the Supreme Court, but would be final and conclusive, and not revisable. There is nothing in the Code—our statute law—which allows any mode of revision, or any appeal from his decision. It is the constitutional provision above cited, and that only, which enables even the Supreme Court to superintend and control his action. No other court can do it, because no statute law or constitutional provision confers upon any other court any such power; but the constitutional provision above cited, in effect, denies such power to any other court, by expressly conferring it on the Supreme Court. This court has original jurisdiction in such case, or, rather, it may, in the first instance, issue a *mandamus* in such case, and thereby control and superintend the inferior jurisdiction, which may be called appellate jurisdiction over such inferior jurisdiction.

The 23d section of the 3d article of the constitution declares, that "every bill, having passed both houses, shall be signed by the Speaker and President of their respective houses." Suppose a bill had passed both houses, and the Speaker had refused to sign it, and application were now made to this court, in the first instance, for a *mandamus* to compel him to sign the bill. Could this court hesitate to grant it? or would it turn the matter over to a Circuit Court, which it knows will not meet until after the General Assembly will have adjourned *sine die*.

The constitution does not fix the time within which he must sign the bill. But the plain construction of it is, that he must sign during the session, and that upon his refusal, this court may compel him to sign before the adjournment. So the 45th

section does not fix the time when he shall certify for a member; but the plain construction is, that, if during the session he refuses to certify, this court may, upon such refusal, instruct him as to the law, and superintend and control him, so far as to make him certify before the final adjournment.

The Circuit Court has no power, in any such case, to award a *mandamus*; for it can only issue a *mandamus* to jurisdictions which are inferior to it, or to compel the performance of a merely ministerial act, where the law itself has fixed the precise amount of compensation, as in the case of Riggs v. Pfister, 21 Ala. R.

The Speaker does not reside at the seat of government, but in Coosa County. If the application for *mandamus* must be made to a Circuit Court, to which one of those courts must application be made? Must every member of the House go home without his pay, and in the spring come back to Coosa Circuit Court to apply for a *mandamus*? Is this the compensation promised to each member by the law? or is this the vain remedy held forth by law, in derision of their injury?

But no Circuit Court sits until next month. Suppose the Speaker dies, or resigns, or removes, before any Circuit Court meets. It is clear that no *mandamus* can be issued by a circuit judge in vacation.—*Ex parte* Grant, adm'r of McCord, 6 Ala. R. 91. For can a peremptory *mandamus* issue without service beforehand on the party against whom it is sought; nor can it issue after the death, resignation or removal of the Speaker from the State.—Mason v. School Dist., 20 Vermont R. 488. Hence, if petitioner must wait until the Circuit Court meets, he waits until long after the final adjournment, and the Speaker may defeat the remedy by his own voluntary act, in resigning or removing from the State. This consideration was held sufficient to support the jurisdiction of this Court, in the first intance, in The State v. Porter, 1 Ala. 688; 5 W. & S. 403.

The remedy by *mandamus* lies from the Supreme Court, in the first instance, even if the Circuit Court could issue it, provided it appears, as in this case, that the remedy from the Circuit Court would not be adequate.—Ethridge v. Hall, 7 Porter 47; Com. v. Mann, 5 Watts & Serg. 403.

But the Supreme Court may well declare the law on the merits, even if it denies the *mandamus*.—*Ex parte* Hoyt, 13 Peters 290; *Ex parte* Jones, 7 Ala. 15.

CHILTON, C. J.—This is an application by Richard O. Pickett, a member of the House of Representatives, for a writ of *mandamus* against William Garrett, the Speaker of said House, requiring him, as such Speaker, to certify to the Comptroller of Public Accounts the amount insisted by the petitioner to be due to him for mileage, or *per diem*, or both, which accrued to him between the period of the adjournment of the General Assembly on the 20th December, 1853, and its reassembling on the 9th January, 1854.

We have had some difficulty as respects the jurisdiction of this court of original applications like the present; but, as the facts set forth in the petition, (and which are admitted by the Speaker,) very clearly show that, if the petitioner have any other remedy, which is questionable, that remedy may be thwarted, we have determined, under the peculiar circumstances of the case, to entertain jurisdiction of the motion. The case of The State, on the relation of the Attorney General v. Porter, 1 Ala. R. 688, although not directly in point, is strongly persuasive in support of our power to grant the relief prayed for.

The question to be decided is, whether, if the General Assembly, by a joint resolution of both houses, pending its regular session, adjourn on the 20th December, 1853, to meet again on the 9th day of January, 1854, the members who go home and return are entitled to mileage, or *per diem*, or to both.

By the 43d section of the Code, "the President of the Senate and the Speaker of the House receive six dollars, and the other members four dollars, for each day's attendance; and are allowed four dollars for every twenty miles travelling to and from the General Assembly; estimating the distance by the direct mail route, if any, and if not, by the land route usually travelled."

The 44th section provides, that, "If any member is detained by sickness, after leaving home, in coming to, or is unable to attend the House after he arrives at the seat of government, he is entitled to the same daily pay as an attending member.

The 45th section declares, that "The compensation due to the members and officers of the General Assembly, must be certified by the President and Speaker respectively, to the Comptroller of Public Accounts, who must issue his warrant therefor on the State treasury." So far as the right to *per diem* com-

pensation is involved, it must turn on the meaning of the words "each day's attendance," as used in the 43d section. It could never have been intended that the members of the legislature should receive pay for those days only on which they were actually engaged in the business of legislation; and neither the language employed, nor the purposes of the statute, would force such a construction upon us.

A member may be engaged in attendance on the General Assembly, during periods of temporary cessations of legislative functions by the respective bodies; and the *per diem* compensation was intended as a remuneration for the services of the members, as well as to provide for their expenses during the period they were required to be absent from their homes in attending to the duties of legislation, as those duties are usually and ordinarily performed. And the object in limiting this compensation to each day's attendance, was, to secure on the part of the member, who was not within the exemptions provided for by section 44, the performance of legislative duty during those days which the house to which he belonged deemed necessary to devote to the business of legislation. It was never intended that the members of the Legislature should not receive pay for Sundays, or pending temporary adjournments upon holidays, or on occasions of the death of a member. The practical construction of the law, from the organization of the government to the present time, has been otherwise, and we have no disposition to depart from it. These are not regarded as permanent cessations in the business of legislation, but in the nature of adjournments from day to day, when, in legal contemplation, the business is progressing. Indeed, it may often happen, that a temporary adjournment for a few days may tend to facilitate the business, since the committees may thus be afforded time to consider of and mature the matter of bills and resolutions referred to them. But when, as in the case before us, there is an adjournment for near three weeks—for such a period of time, as to afford a reasonable inference that it was designed, not to facilitate the business of the session, but to operate a cessation of it for the given period, that the members may return to their respective homes—it would appear absurd to say that a member was in attendance upon the General Assembly, when it was not convened, and could not be, until the period which it had fixed

for re-assembling had arrived. Thus much upon the question as to the *per diem*.

We come next to consider the right to mileage. By the amendment to the constitution, the members of the General Assembly are elected biennially; and, according to section 32 of the Code, "The regular sessions of the General Assembly are held on the second Monday in November, 1853, and every two years thereafter." As the law now stands, there can be but one regular session every two years, and this session is closed when the Legislature adjourns *sine die*. But the Governor is authorized, by proclamation, on extraordinary occasions, to convene the Legislature, at the seat of government, or at a different place, if that shall have become, since their last adjournment, dangerous, from an enemy, or from contagious diseases; and if the two houses shall not agree as to the time of adjournment, he may adjourn them to such time as he may think proper, not beyond the day of the next biennial meeting of the General Assembly.—Const. Ala., Ar. I. § 8, and amendment. Here, then, we have provision for a regular biennial session, and for a special or called session by the Governor.

The constitution is silent as to the power of the Legislature to provide for a special session; but it is a sound rule of construction, that, while the federal government can exercise no power not delegated by its constitution, either in express terms or by necessary implication, the State legislatures may exercise all powers falling within the legitimate scope of legislation not expressly or by implication denied either by the constitution of the State or of the United States. So that we conceive, there is no constitutional objection to the Legislature's providing, at a regular session, for a special or extraordinary session. Exigencies might arise, which would render the exercise of such power of the last importance to the State; and we think it too clear to admit of any doubt, that, if the intervening time be so great as reasonably to require the dispersion of the members in going to and returning from such called or special session, whether convened by the Governor, or by an act or resolution of the general session, they would be entitled to mileage. We will not say but that the Legislature may provide for such special session, without the lapse of so much time between it and the regular session as intervened in the case before us. There

might be extraordinary emergencies requiring such legislation. Now, it is conceded by all, we believe, that for attendance upon such sessions, the members would be entitled to mileage. What, we ask, is the difference between such session, and the present session after the reassemblage upon the 9th day of January last, as respects the necessity for the members travelling to and from the General Assembly? The length of time between the adjournment and cessation of the business of legislation and the time fixed for re-convening, was so great, as to furnish a reasonable inference that it was contemplated the members should return to their respective homes and constituency. It may have been right and proper that they should so return, to be advised by their constituents respecting their will with regard to important measures before the General Assembly. Be this, however, as it may, we are not permitted to go behind the adjournment, to investigate the causes which led to it. This is a political question, which it was for the Legislature to decide, and with which we have nothing to do. We must intend that the ground for adjournment was sufficient, and the period which intervened was of such duration as reasonably to require the members to return home. When, therefore, they were going and returning, they were travelling to and from the General Assembly, within the meaning of the 43d section.

Our opinion, in short, is, that when an act of legislation (and an adjournment is such an act) involves the presumed necessity of the members returning to their constituents, they are entitled to their allowance for such travel, within the meaning of the law. It follows from what we have said, that the members are not entitled to *per diem* compensation, but are entitled to mileage.

The motion is accordingly granted as to mileage, but denied as to the *per diem*.

Ex Parte THE CITY COUNCIL OF MONTGOMERY.

1. The Supreme Court will not interfere, by *mandamus*, or otherwise, to compel the dissolution of an injunction on the filing of an answer.

The City Council of Montgomery, by its attorney, Thomas J. Judge, made application to the Supreme Court, by petition, for a *mandamus* against the Hon. Joseph W. Lesesne, Chancellor of the Southern Division of the State of Alabama, requiring him to dissolve an injunction which had been granted in a certain cause pending in the Chancery Court of Montgomery, wherein Marion A. Baldwin, Attorney General of the State, on the relation of George Montague and others, was complainant, and the petitioner was defendant. The petition alleges, that said bill or information was filed, to prevent a contemplated extension of the city grave-yard; that the defendant had filed its answer to said bill, fully denying all the grounds of equity therein alleged, and then moved to dissolve the injunction; which motion the court discharged, with costs; that the petitioner has no right of appeal from said decision, and that the necessity for the dissolution of said injunction is urgent.

Thos. J. Judge, for the petitioner:

The only matters of equity alleged in the bill, are: 1st, that the petitioner proposed and intended to close up and obstruct Jefferson and Columbus streets, and also a public road, called the "Judkins Ferry Road"; which allegations are met in the answer, and fully denied; and, 2nd, "that the health, comfort, convenience and enjoyment of the citizens of Montgomery will be materially impaired," by the proposed extension of the grave-yard; that the same "will be highly obnoxious and offensive to the senses of the citizens"; that the value of a great portion of the real property of the city will be injured thereby"; and that such extension "will be both a public and private nuisance, and productive of irreparable injury." These are mere general conclusions, not specifying any facts from which

they could legitimately result, and cannot give equity to the information or bill. If. however, they constitute equity, they are fully met and answered.

The following authorities are referred to: 2 Story's Equity § 924 a; 10 Ala. 63; Roper v. Randolph, 7 Porter 238; The State v. The Mayor &c. of Mobile, 5 *ib.* 279; Earl of Ripon v. Hobart, 3 Mylne & K. 169; Jerome v. Ross, 7 Johns. Ch. R. 314. Erecting "disagreeable objects" no nuisance.—Drewry on Injunctions, mar. p. 240, 11 Law Library 165.—The case in 8 Iredell's Equity R. 9, referred to in the decretal order of the chancellor, is wholly unlike the present, and is not an authority to sustain his position.

CHILTON, C. J.—The Supreme Court of this State has a general superintendence and control over inferior tribunals, as prescribed by the constitution of the State.—Art. 5 § 2. This control and superintendence must not, however, be exercised capriciously or arbitrarily, but according to the established forms and usages which obtain in the administration of justice.

Should this court interpose its jurisdiction to control the inferior courts in the exercise of their discretion, either in the making and continuing of interlocutory orders, or in refusing to make them, in the progress of causes, it would be difficult to calculate the delay, embarrassment and inconvenience which would result, not only to suitors, but to the courts themselves.

If every order of continuance, every refusal to grant new trials, and the numerous interlocutory orders which are made in causes, both at law and in equity, from their inception to their final termination, could each be made distinct subject-matter for an appeal to this court, at the hazard of a heavy bill of costs, this court would become an intolerable grievance, and there would be no end to the litigation to which a cause requiring a great number of such orders might be subjected.

The granting or continuing of injunctions by the courts of equity, is a matter within the sound discretion of those courts, to be exercised with reference to the peculiar circumstances of each case. Especially is this so with respect to their jurisdiction over the subject of nuisances. Aside from the statute which allowed an appeal, in cases where the chancery court dissolved an injunction, to the next term of this court, no such

appeal would lie; and this court has uniformly refused to interfere with the exercise of the discretion vested in the primary courts, in the making of interlocutory orders, the granting or refusal of new trials, and the like.

In the case before us, we are asked to control the Chancellor, in requiring him to dissolve an injunction, which, in his opinion, under all the circumstances of the case, ought not to be dissolved. Without intimating any opinion as to the correctness of his conclusion, considered in connection with the facts, we are satisfied that the case made by the petitioner presents no ground for our interference. *Mandamus* lies to compel the inferior courts to exercise a discretion, but not to control that discretion.

It was suggested by the counsel for the petitioner, that, under the decision made by a majority of this court in *Ex parte* Morgan Smith, at the last term, a prohibition would lie. The two cases are not analogous. In that, it was insisted the Chancellor had exceeded his jurisdiction; in this, no question as to jurisdiction is raised, but merely that the court has committed an error in refusing to dissolve. It is too well settled to require the citation of authority, that for mere errors of judgment, in respect of matters confessedly within the jurisdiction of the court, no prohibition lies.

Let the motion be denied, at the cost of the petitioner.

COLLIER, Governor &c., *vs.* FRIERSON et al.

1. The State constitution can only be changed by the people in convention, or in the mode prescribed in the instrument itself; and if the latter mode is adopted, every requisition of the constitution must be observed.
2. The amendment of the constitution, submitted to the vote of the people by the General Assembly of 1844—5, proposing *biennial* (instead of *annual*) elections of the State Treasurer and Comptroller, not having been properly ratified at the next session of the General Assembly, those officers hold their offices for the term of one year only.
3. The General Assembly of 1844—5 having proposed several amendments of

the constitution, joint resolutions were adopted at the next succeeding session, reciting in the preamble that, "whereas the General Assembly of this State, at the last session of the same, duly submitted to the people of said State proposed amendments to the constitution; and whereas the people of this State, in manner and form as provided by the constitution, have accepted the said amendments, which are in words and figures following" &c., setting them all out except one, which was entirely omitted; and the usual clause was then added, enacting "that the aforesaid amendments to the constitution, proposed as aforesaid, and accepted by the people as aforesaid, be ratified, and that the same, from and after the passage of this resolution, be and form a part of the constitution of the State of Alabama": *Held*, that the amendment which was entirely omitted from the ratifying resolutions, was not constitutionally ratified, and therefore failed.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. GEORGE D, SHORTRIDGE.

THIS was an action of COVENANT, in the name of Henry W. Collier, Governor of the State of Alabama, against Samuel G. Frierson and his sureties on his official bond as State Treasurer; the declaration assigning seven separate breaches. The defendants craved oyer of the bond, and demurred to the whole declaration, and to each breach separately, "in short by consent." The court sustained the demurrer, and its judgment is now assigned for error. The facts necessary to an understanding of the points presented by the demurrer, may be gathered from the opinion and briefs.

ORMOND & NICOLSON, for the appellant:

Covenant will lie upon this bond, under our practice.—Watts v. Shepherd, 2 Ala. 425; Hill v. Rushing & Wood, 4 *ib.* 212; Clay's Digest 330 §§ 95, 96.

The second and sixth breaches are well assigned, because the law requires that the treasurer, before entering upon the duties of his office, shall take an oath, and give his bond.—He is not treasurer until he does this: these prerequisites are necessary to his induction into office: the election does not make the officer, without the bond. He is sued on his bond as treasurer; and whether this money was in his hands at the time of the execution of the bond, is mere matter of proof. Frierson not being treasurer until his bond was given, it was useless to have averred a mere legal conclusion. It

is averred that he had the money in his hands while he was treasurer; and he was not treasurer until his bond was executed and approved.

There are two modes of altering the organic law: one is by convention, and thus making a new constitution; the other is by making amendments in the mode therein pointed out. In either case, it is the act of the people. The Legislature, *pro hoc vice*, is a convention, both in proposing and in ratifying the act of the people. This is shown by the clear difference in the number of votes required to effectuate the object. It is not necessary that the Governor should approve the act, for the vote required to pass it overrides the executive veto, if it were attempted to be interposed.—Such action is the very highest power known in government; and when the organic body have declared that certain propositions shall be laid before the people, that body is alone the judge of the mode and manner in which they shall get before the people. If the propositions were duly published, and notice given of the intended changes, then, surely, this high power had the right to prescribe the mode in which it should be carried out. If, in their opinion, this could be attained by simply asking two questions, they are the judges of the propriety of the mode, and no one has the right to impugn it. The argument, then, that the people have not voted on changing the twenty-third section of the fourth article, is fallacious. If the directions of the Legislature were pursued, it is sufficient.

We contend, further, that there were, in fact, but two amendments. The Legislature only put two questions, to both of which the voter might say "yea" or "nay," or "yea" as to one, and "nay" as to the other; but as to the six sections in which the word "annual" was proposed to be changed to "biennial," he could only give the same answer to all. The Legislature was the exclusive judge as to whether the object could be thus accomplished.

We come now to consider the acts themselves. There can be no question, that all the clauses where the word "annual" occurs, were inserted in the original proposition, and, if the above argument is correct, they were voted on by the people. The act of ratification creates the only doubt in regard

to the matter; because the twenty-third section of the fourth article is not contained in the enumeration, it is contended that the vote of the people is not ratified. This enumeration is nothing more than an improper quotation of a former law: it evidently intended to quote that law, but misquoted it.—Can this mere mistake or omission prevail against the clear and explicit language of the preamble and enacting clause of the act of ratification? The criticism to which the enacting clause has been submitted, distorts its meaning; for, if the Legislature, by this clause, meant to say that the people only voted for the propositions contained in the recital of the ratifying act, then it recites what is not true, if the General Assembly had the right, as above contended, to declare how all the proposed changes should be effected by a response to two simple questions. The argument involves the absurd conclusion, that this court, at most but a co-ordinate department of the State, will be compelled to say that the Legislature has certified and ratified a positive untruth.

It is clear that the courts have the right to judge of the constitutionality of all laws; but this does not involve the right on their part to prescribe to the Legislature rules for the conduct of business coming within the purview of its legitimate functions. When the Legislatue has declared an act done, which it alone has the power to do, it does not become the Judiciary to gainsay it. "It is to be lamented," said a great statesman, "that men are compelled to examine into the foundation of government"; and it would be lamentable indeed, if all the machinery and minute action of legislation had to be submitted to the stern criticism of a judicial tribunal. If all the elements necessary to the perfection of a law had, in every case, to be proved, it would be a matter of impossibility in many cases,

It is said, that the constitution required the act changing this twenty-third section to be read on three several days, and, as the act itself does not contain this section, therefore it has not been changed. But the act says, that all "the amendments proposed as aforesaid," are ratified. How could they be ratified, without being read? The "*ipse dixit*" of the Legislature is enough, and cannot be inquired into. Why not call for proof that the proposed amendments

were duly published in print, as prescribed by the constitution? It could never be tolerated that the legislation of the county should be submitted to such a merciless inquisition.

R. H. Smith, *contra:*

Frierson was elected treasurer in January, 1846, and gave bond in February, 1846, on which bond this suit is brought. The declaration seeks to deduce liabilities on account of moneys received by him more than one year from the beginning of his term. To this a demurrer is interposed, raising the question, whether that bond is liable for a default committed more than one year from his election.

The following propositions are undeniable: 1. That the sureties to the bond are only liable for defaults done from the date of the bond up to the expiration of the constitutional term of office.—9 Wheat. 720; 7 How. Miss. R. 543; 2 B. & A. 431; 2 M. & S. 363; 3 *ib.* 502; 12 Wheat. 505; 4 Hen. & Mun. 208; 2 Metcalf 540; 8 Mass. 275: 2 Saunders 414, and notes; 2 M. & W. 484. 2. That the plaintiff having sued the defendants jointly, must recover jointly, or not at all. This has been frequently so decided by this court.

What is the tenure of office of the State Treasurer? Prior to the 8th of January, 1846, he was required to be elected annually, (Const. Ala., Art. IV § 23.) and this made the tenure of his office but one year. The mode of amending this or any other clause of the constitution, is found in Clay's Digest XL. Has the tenure been chaged in the mode and manner thus proscribed? The requisitions to a change are: 1st, a proposal to amend by two thirds of the General Assembly; 2ndly, and above all, an approving vote by the people; 3rdly, a ratification by two thirds of the succeeding Legislature; and, 4thly, these legislative steps are valid, provided the amendments (not the resolutions) shall have been read, at each session, on three several days.

Suppose that every other requisite be granted to have been performed. The comfirmatory act of 1846 recites, by preamble, that certain amendments had been proposed and accepted. Suppose it had then said, Be it therefore enacted, that the proposed amendments, made as aforesaid, and

accepted by the people as aforesaid, be ratified, (and this is, in effect, what it does say,) could it be pretended that the amendments themselves had been read three times, on three several days? At the third reading, the thing read passed, and came forth the embodiment of what was read: that thing was the resolution, which passed. In the case put, a description of something which the previous Legislature had passed was read, by which it might be known what the previous Legislature had acted on; and this description might suffice to let us know what the Legislature referred to, and would fulfil the demands of the constitution, if certainty of description was the test. But the proviso, on which the validity of the proposed change rests, is, that the amendments themselves, not a description of them, be read on three several days. Unless reading a description of a thing means reading the thing itself, the proposed amendments were not read as required by the constitution; for there is a total omission to put in the paper passed one word in reference to the twenty-third section of the fourth article.—Why this silence, will appear more fully in the sequel: the ratifying Legislature did not put it in, simply because the preliminary requisites had not been performed.

The people, in whom resides the vital power in reference to organic law, could only vote when polls were opened, and questions proposed, and a mode given by which to declare themselves. The constitution itself requires, that, when an amendment is proposed, the returning officers shall open a poll for, and make due return of, all those who have voted on the proposed amendment. It is silent as to the manner in which the question shall be put or answered, or the answer taken or certified. These particulars, necessary to the enjoyment of the right, are left to ordinary legislation, and without such the right cannot be exercised. The Legislature prescribes this law; that law omitted all questions as to the Treasurer's tenure of office. None, then, was asked: no answer was given, and, of course, the people never voted on that question. The Legislature must not only propose a change, but must do it in such a manner that the proposal can be answered. In this case, it could not be answered, and it was not. The question was asked, Are you in favor

of biennial sessions. The people answered in the affirmative, and so answered all they were asked, but nothing more. The Legislature, then, never proposed the amendment in an answerable shape; the people never voted on it: and the subsequent Legislature, seeing this, did not embrace this change in their resolutions of confirmation. The omission having been made in the questions propounded, the subsequent omissions were the result of necessity.

The only arguments left in favor of the change, are: 1st. that the change from annual to biennial sessions, *per se*, changed the Treasurer's term; that is, the constitution is changed by implication; and, 2ndly, that the Judicial Department cannot look behind the resolution, to see whether it is of binding force. In reference to the second ground: Suppose the Legislature is the sole judge of *how the people voted* on a given question submitted to them; *whether they ever voted at all*, is a very different inquiry. The constitution prescribes the mode of changing it. Until that mode is resorted to, it stands, in the language of its preamble, "to promote the general welfare, and to secure to ourselves and to our posterity the rights of life, liberty and property": it stands a check against any law, save in the manner prescribed; it is the prescribed will, above and beyond any reach of constructive change. This peculiar security is the distinctive feature of a republic, the essential and marked difference between a monarchy and a republic. The repeal of a common statute, even, by implication, is never favored; it is never allowed save from necessity; convenience is not sufficient. The Treasurer's tenure of office is simply inconvenient; for, 1st, the constitution gives the executive the appointing power; (Art. 4 § 15;) 2ndly, a special session of the Legislature may be convened to elect; and, 3rdly, by a presumption of change, a high policy would be contravened.—The object is, that year by year, and each year, future fitness for the office may be judged by the past. Change in finances, &c., might and would require different official abilities at different times. A presumption even arises against the change, from the fact that the Legislature made no change in the laws regulating his duties. When the constitution was changed in 1846, it became not only convenient, but necessary, that sena-

tors should hold by a different tenure. Instead, however, of invoking convenience and implication, the Legislature and people again altered the organic law in this regard, in the mode prescribed by the constitution.—See amendments of 1849—50.

To maintain that the Judicial Department cannot go behind the resolutions, is to maintain that the Legislature may change the constitution at will, without and in spite of the people.—The people create the constitution; the constitution creates the Legislature: it confines it to ordinary legislation, to which the Governor must assent; it gives it power to propose amendments to the constitution, in reference to which the Governor is no actor; (Hollingsworth v. Virginia, 3 Dallas 378;) it establishes courts to guard it from inroads by the Legislature. The Legislature, then, is held within the pale of the constitution by the courts; and when it transcends it, there are but two remedies: 1st, judicial intervention; and, 2nd, revolution. To the Legislature may be confided the sole power of deciding how the people voted; to the Judiciary, the questions, did they vote, and have the other steps been taken to change the organic law. On this subject, see 3 Story's Com. on Const. 701; 1 Kent's Com. 448, 449, 453. As to the doctrine of amendments to the constitution, see 3 Story's Com. on Const., ch. XLI, 679, 690. As said, the Legislature, in this regard, are not law-makers, but law-suggesters, and then law-ratifiers: the people are the makers and re-makers of the constitution.

Applying the ordinary rules of construing laws to the resolutions of 1846, what is their construction? In a deed or law, the more special description governs the general; the preamble is no part of the law, and is only resorted to for explanation from necessity. The preamble to the resolutions of 1846 asserts that "proposed amendments" had been suggested, and then adds, "and whereas the people have accepted said amendments, which are in the words and figures following": and then follows a copy of the previous resolutions, proposing a change to biennial sessions and the removal of the seat of government; but not one word is said about changing the Treasurer's tenure, which is fixed by a distinct constitutional provision. Then comes the enactment, "that the aforesaid amendments, proposed as aforesaid, and accepted as aforesaid, be ratified." To what do the words "aforesaid amendments" refer: to those that

were said before, or those that were alluded to before? Plainly to the former. The language analyzed is this: the Legislature have before proposed certain amendments, of which the people have accepted such as are in the words and figures following, &c.; therefore, these, so accepted, are ratified.

A distinct proposition was made to the Legislature of 1845–6, to change the resolutions under consideration, so as to embrace the Treasurer's tenure, *and it was rejected.*—See House Journal, 1844–6, pp. 183–4–5. This shows that the House only had under consideration the removal and biennial questions.

The codifiers were required to embrace in the Code the State constitution. They did embrace it, and the next Legislature adopted it. By that Code, the amendments of 1846 do not extend to the Treasurer's tenure: it omits the preamble, and specifies the changes which were made; but it does not specify any change in the twenty-third section of the fourth article.

The first count in the declaration is a mere general assignment; it does not state that Frierson received any money, nor, if so, how much; nor does it allege what measure of injury has resulted from the alleged neglect. The second count alleges a default after Frierson's election; *non constat*, that it was after the execution of the bond, which was given a month after his election. The bond does not cover past defaults.

GOLDTHWAITE, J.—The twenty-third section of the fourth article of the constitution, as it was originally adopted by the people in convention, is in these words: "A State Treasurer and a Comptroller of Public Accounts shall be annually elected, by the joint vote of both Houses of the General Assembly."—The main question in the case before us, is, whether this section has been changed.

The constitution can be amended in but two ways: either by the people, who originally framed it, or in the mode prescribed by the instrument itself. If the last mode is pursued, the amendments must be proposed by two thirds of each House of the General Assembly; they must be published in print, at least three months before the next general election for representatives; it must appear, from the returns made to the Secretary of State, that a majority of those voting for representatives

have voted in favor of the proposed amendments; and they must be ratified by two thirds of each House of the next General Assembly after such election, voting by yeas and nays, the proposed amendments having been read, at each session, three times, on three several days, in each House.—Con. Ala., Clay's Dig. XL.

We entertain no doubt, that, to change the constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself, must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law.—The mode by which amendments are to be made under it is clearly defined. It has been said, that certain acts are to be done—certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the Legislature or any other department of the government, can dispense with them. To do so, would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment, which is shown not to have been made in accordance with the rules prescribed by the fundamental law.

We now proceed to the inquiry, as to whether the requisitions of the constitution have been complied with, so as to effect a change in the section referred to.

The joint resolutions adopted at the session of 1844–5, (Sess. Acts 208,) proposed eight amendments to the constitution, one of which was the striking out the word "annual," and inserting "biennial" in its place, in the twenty-third section of the fourth article, which would have had the effect of increasing the tenure of the office of the Treasurer and Comptroller to two years.

By the act approved the 24th of January, 1845, (Sesssion Acts 209,) it was made the duty of the sheriffs, and other officers superintending the elections, to require the electors to vote only on two of the amendments offered, neither of which, however; embraced the amendment proposed in relation to the twenty-third section of the fourth article; but, as the constitution gave the elector the right to vote on all of the amendments, the act of 1845 could not deprive him of this right. The law

was certainly objectionable, as its obvious tendency would be to prevent the expression of the opinion of the electors upon any other of the proposed amendments, than those brought directly to their notice by the questions of the returning officer. It was, however, the constitutional duty of the officers, to open a poll for, and make return to the Secretary of State of, the vote on the amendment proposed; and the duty thus imposed could not be affected by the act referred to. As to whether the returns made show that a majority of those voting in favor of representatives, voted in favor of the amendments, as the case is presented before us, we cannot inquire. We must presume that the returns were duly made, and the basis properly laid, for the subsequent action of the members of the Legislature.

At the next session, joint resolutions were adopted, the preamble to which recites, that, "Whereas the General Assembly of this State, at the last session of the same, duly submitted to the people of said State proposed amendments to the constitution: and whereas the people of this State, in the manner and form as provided by the constitution, have accepted the said amendments, which are in words and figures following." Then follow all the amendments which were proposed at the preceding session, except the one proposing the change in the twenty-third section of the fourth article, which is entirely omitted; and then the ratifying resolution is added, in these words: "Be it resolved, by the Senate, &c., two thirds of each House concurring, that the aforesaid amendments to the constitution, proposed as aforesaid, and accepted by the people as aforesaid, be ratified, and that the same, from and after the passage of this resolution, be and form a part of the constitution of the State of Alabama."

This act is, in our opinion, legitimately susceptible of but one construction. The preamble recites, that the amendments which had been proposed at the previous session, had been accepted by the people; and had the resolution gone on to declare, that such amendments were ratified by two thirds of each House in the mode required by the constitution, it would have been sufficient, as we could not, upon the demurrer, have gone behind the resolution and inquired whether the amendments had been read the number of times required, and passed by yeas and nays. But the act purports to set out the resolutions

which were proposed and accepted by the people, and the rule is, that the special governs the general. We know, it is true, that another amendment than those embodied in the act was proposed by the preceding Legislature; but we do not know, except so far as the act informs us, whether the people had accepted that amendment; and we are unable, upon any sound principle of construction, to arrive at this conclusion from the act itself. Our conclusion would rather be, that the people had accepted only those amendments which are set out in the act.

Again; we know of no rule of construction by which the word "aforesaid," in the ratifying clause, can be referred to any other amendment than those which the resolution sets forth. It is the same as if the clause had enacted, that the amendments set forth in the preamble, "having been proposed as aforesaid, and accepted by the people as aforesaid, are hereby ratified"; and, it is obvious, that if such had been the plain language of the act, the ratification could have embraced only the amendments which were particularly referred to.

The view we have taken we regard as conclusive of the case, and we make the decision with less reluctance, for the reason, that, on looking to the journals of the General Assembly, we find that the amendment which was omitted in the act last referred to, was not read in either House during the session at which it could have been ratified, and this omission, we are inclined to think, had it been properly brought to the notice of the court, would have been equally fatal to the amendment.

The change, from annual to biennial sessions, cannot affect the section we have considered. Both clauses in the constitution can stand together, and, although some inconvenience may result, if it be deemed necessary to convene a special session of the Legislature for the election of the Treasurer and Comptroller, a point upon which we express no opinion, this inconvenience must be submitted to. We cannot establish an unsafe precedent upon a question of constitutional law, to escape from it.

Our views upon this question render it unnecessary to decide any other presented upon the record.

Judgment affirmed.

SMOOT *vs.* THE MAYOR &c. OF WETUMPKA.

1. When the act incorporating the municipal authorities of a city makes it their duty to keep in repair the bridges and streets within the corporate limits, and in consideration thereof relieves them from other duties, an action on the case lies against them for a neglect of this duty, in favor of a person who is thereby injured.
2. When such action is brought to recover damages for injuries caused by the fall of a bridge, it is not necessary to aver in the declaration that the bridge was broken without any fault on the part of plaintiff; nor that he could not pass the street, of which the bridge formed a part, without crossing the bridge; an averment that it was defendants' duty to keep the bridge in repair, and that the injury resulted from its unsafe and rotten condition, which rendered it incapable of sustaining the usual burdens which were accustomed to pass over it, is sufficient.
3. A count averring that the bridge was private property, not belonging to the corporation, and had become a public nuisance from its unsafe and rotten condition, and that said corporation, knowing this, failed to abate it, as they by law were authorized and required to do, whereby &c., is bad on demurrer; the failure to exercise judicial power properly, in the absence of malice and corrupt intention, constitutes no ground of action.

ERROR to the Circuit Court of Coosa.

Tried before the Hon. JOHN D. PHELAN.

ACTION on the case by Benjamin A. Smoot against the Mayor and Aldermen of the City of Wetumpka, a municipal corporation, to recover damages for injuries sustained by plaintiff from the breaking down of a certain bridge in one of the streets of the city, while he was crossing it with his wagon and team; which bridge, the declaration avers, it was the duty of said defendants to keep in repair, but they wholly failed and neglected to perform that duty, and, with actual notice of its rotten and unsafe condition, negligently and carelessly suffered it to remain so. The declaration contains four counts, which are particularly described in the opinion. The defendants demurred to the whole declaration, and to each count separately; and the demurrers were sustained. The judgment on the demurrer is now assigned for error.

L. E. PARSONS and N. S. GRAHAM, for plaintiff in error:

It is admitted that no action lies for a public or common nuisance, but an indictment only; but where a private person suffers some direct and particular damage by a public nuisance, he shall have a private satisfaction by action.—Broom's Legal Maxims, 50 Law Lib. 32; 3 Black. Com. 219, 220; also, note 7, and authorities there cited, on top p. 173. To the same effect is the case of The City Council of Montgomery v. Hutchinson & Scott, 13 Ala. R. 573. Again; it is said, "an indictment may be sustained for the general injury to the public, and an action on the case for a special and particular injury to an individual."—Mayor v. Henly, 3 B. & A. (23 Law Lib.) 36, and the cases cited in the opinion of Lord Tenterden, C. J.; also, King v. Ward, 31 Law Lib. 92; 27 E. C. L. R. 366; Angell & Ames on Corp. 329; Townsend v. Susquehana Turn. Road, 6 Johns. 90; Riddle v. The Proprietors of Merrimack, 7 Mass. 169.

The act of incorporation, passed January 30, 1839, confers powers and privileges on the citizens of Wetumpka in their corporate capacity, which may well be regarded as a consideration for the performance of the duties imposed on them by their charter.—Acts of 1838–9, p. 46, §§ 7, 8, 11, 12. Their failure to perform this duty renders them liable to an indictment; but a private person may also sue, on showing special injury to himself arising from that failure. This seems to be the result of all the cases, though there is some conflict among them, and it is certainly in accordance with sound public policy.—Cunliff v. The Mayor of Albany, 2 Barb. S. C. R. 191; Hay v. The Cohocs Company, 3 *ib.* 43; Sheldon v. Fairfax, 21 Vermont 105. This being an incorporation, the decision of Lord Kenyon in Russell v. The Men of Devon, 2 Durn. & East 667, does not apply; for, in that case, the argument proceeds upon this question, "Whether this body of men who are sued, are a corporation, or *quasi* a corporation."

In the case of The Freeholders of Sussex v. Strader, 3 Har. 117, the court say, the better and more modern doctrine is, that a corporation may be held liable even for its torts, in a special action on the case for a neglect of duty; and they cite the case of Yarborough v. The Bank of England, 16 East 6. See, also, Bartlett v. Crozier, 15 Johns. 250; 8 Barb. S. C. R. 651;

Meares v. The Com'mrs of Wilmington, 9 Iredell 73; Town Council of Akron v. McComb, 18 Ohio 229; on which cases the plaintiff in error confidently relies.

RICE & MORGAN, *contra*:

1. The charter of the city of Wetumpka imposes no higher obligations on it, in reference to roads and bridges, than the law imposes upon the commissioners of roads in each county. It is a municipal corporation, exercising its general powers for the public good. It has no emoluments arising from the streets or bridges, which it may establish or erect; it has no peculiar, private interest in them, but establishes them in the exercise of its general powers, and in obedience to the law, for the public good alone. It owes these duties to the public only, and not to any individual; and no action will be against it, at the suit of an individual, for a neglect to perform such duties.—Morey v. Newfane, 8 Barb. 645, which is a complete answer to all the New England cases cited for the plaintiff in error, and is supported by the cases in 11 Humph. 217; 12 Missouri 415; 3 Har. (N. J.) 108.

In all the cases which tend to establish the doctrine that municipal corporations are liable for injuries sustained by individuals, the act complained of was either a usurpation of power not conferred by law, or some act done, resulting in injury to a private person, in the abuse of power conferred by law; a simple neglect of duty to the public, gives no ground of action to an individual. The case of Goodlow v. City of Cincinnati, 4 Ohio 500, decides, that the corporation is liable for an illegal and malicious act done by its agent, acting in pursuance of the authority conferred by the corporation; but it does not decide anything in reference to a mere omission of duty on the part of the corporation. The case of The Mayor of New York v. Furze, 3 Hill 616, was rested, so far as the right of action was concerned, upon the ground, that the occupants of the houses and lots in the neighborhood, having been charged with the expenses of the sewers said to have been out of repair, had thereby acquired a right to the common use of them, and a corresponding duty devolved on the corporation to keep them in repair. This duty the city owed to the citizens in the neighborhood, as well as to the public; but the remedy was given on

the idea of an implied contract with those citizens, whose property had been taxed for that purpose, to repair the sewers.

None of the counts of the declaration aver that the bridge was broken without the plaintiff's fault; and the facts averred in three of the counts do not negative the idea that he was at fault in the matter—that he was carrying too much burthen on his wagon.

The third count is, in substance, the same as the others. The intendment of law, upon the facts stated in it, is, that the street and bridge had become public by use, and by the continuation of the repairs, and that the bridge had become a public nuisance, by the rotting of the timbers, &c. It is not the case of the erection of a nuisance; there is no act done by the city which was calculated to create a nuisance, but the nuisance arises from the neglect to perform a duty which the city owed to the public, not to particular individuals or localities; not a duty arising from a condition in the city charter, or from an implied contract, but a duty to be exercised by the city legislatively, for the general good, and in obedience to a general expression of the legislative will as contained in the charter. The case cited from 27 E. C. L. R. 366, is not in point; the grant, in that case, was upon condition, and upon a valuable consideration; the acceptance of the grant imposed upon the defendants the discharge of a public duty, as trustees for the benefit of certain persons in a certain locality; and the action really rested, and was sustained, on the ground that a failure to repair was a breach of the condition of the charter, which was a contract with the crown to do certain acts, for the benefit of certain localities, in consideration of certain valuable profits, immunities, &c. In the case at bar, there is no such implied contract, but only a general duty to the whole public, which, if not performed, gives no right of action to an individual. The case of Stetson v. Faxon, 3 Hill, is similar to that of the Mayor of L—— v. Henly, and the recovery was proper, upon the maxim "*sic utere tuo ut non alienum lædas.*" All the cases, from that reported in 2 Term R. 667, show that corporations stand on a footing with individuals, only when they exercise their powers for private emolument, and not solely for the public good.—8 Barb. S. C. R. 645; 1 Saunders' R. 485 (note 1.)

The declaration nowhere shows that plaintiff was forced to

pass over the bridge; that there was no other convenient way, or no way provided to avoid the bridge; and there is no averment that the act was without the fault or negligence of the plaintiff; for aught that appears, these facts may exist.—Smith v. Smith, 2 Pick. 344. Is the liability of a municipal corporation sufficiently averred, by simply stating that a certain bridge, on a certain street, open to public use, was out of repair? Is it a legal inference from these facts, that the corporation has violated the law defining its duties, or that the plaintiff has been injured by a breach of its general duties? The averment is, not that the highway or street was impassable, but that the bridge forming a part of it was out of repair.

CHILTON, C. J.—Before proceeding to discuss the main proposition involved in this case, it is proper to note the objections taken to the structure of the counts.

The first count, after setting out the corporate character of the defendant, and averring that, under the act of incorporation, said defendant was bound to keep, and of right ought to have kept, the streets and highways of said city of Wetumpka in good repair, and that the revenue of said city was ample and sufficient for that purpose, which revenue the said corporation was empowered by law to use for that purpose, proceeds to state, "that the defendants, not regarding their duty in this behalf, and contrary to the provisions of the act aforesaid, neglected to keep the said streets and highways in good repair, and so mismanaged them that they were impassable, unsafe and dangerous, and that said plaintiff, passing and driving over and along one of the public streets of said city, and within the corporate limits thereof, as he had a right to do, viz., a street usually known and called Company street, (commencing and ending within the corporate limits of said city,) and a certain bridge, being a part of said street, and within the corporate limits aforesaid, on account, and by reason of, said neglect, mismanagement and disregard of duty as aforesaid, had become rotten, unsafe and dangerous, of which said corporation had then and there, and for a long time previous, positive notice, and by means whereof, said bridge, while the wagon and team of the said plaintiff were passing over the same, fell through, and was broken down; whereby said wagon, of the value of five

hundred dollars, was broken, split and fractured, and the plaintiff's team of mules, of the value of one thousand dollars, wounded and killed; whereby the plaintiff was deprived of their use," &c.

The second count is substantially like the first, except that it superadds, that the defendant was accustomed to keep said street and the bridge in good repair, and had treated the same as a public street, the same being of great public utility and necessity, and disregarding their corporate and accustomed duties, failed to keep the same in repair, but knowingly suffered the bridge on said street to become unsound, rotten and dangerous; and in consequence of their disregard and neglect of duty, imposed by their charter, and which before that time they had been accustomed to perform, the said bridge became incapable of sustaining the usual burthens which were accustomed to pass and repass over it, and the plaintiff, not knowing this fact, attempted to pass over it with his wagon and team, when it broke down, by reason of its unsound and rotten condition, causing the damage of which the plaintiff complains.

The third count varies the allegations, by averring that the defendants had no power or control over the said street, but that it was made their duty by the charter to remove all nuisances in said city; that this street was not a legally established highway in the city, but was kept open for the use of persons, wagons, &c., passing to and from public warehouses in the city for the storage of cotton, &c.; that said corporation erected the bridge on said street, which, by their neglect, and by reason of its decayed condition, became and was a nuisance to the public, which was made known to the defendants; and the plaintiff, in passing with his wagon, loaded with cotton, to a public warehouse, attempted to cross said bridge, when it fell through, by reason of the rotten, unsound condition of said bridge, causing the damage complained of.

The fourth count avers, that the corporation was bound by their charter to keep the streets, alleys, &c., of the city in repair, as also such streets as, after the act of incorporation, should be dedicated to the use of the city by the owners of the soil within the incorporation; that this street had been so dedicated, and used for fourteen years preceding the injury complained of, and was of great public utility and necessity; that

said corporation had ample means to keep said street and the bridge erected thereon in good order and repair, but so negligently conducted as knowingly to suffer the bridge to be and remain out of repair, and so rotten and unsafe that it broke down while the plaintiff was crossing over on it, injuring his wagon and killing his mules, &c.

1. It is insisted by the counsel for the defendant in error. that none of the counts contain an averment that the bridge was broken without the fault of Smoot. This objection is not tenable. The averment that the injury resulted from the unsafe and rotten condition of the bridge, which rendered it incapable of sustaining the usual burthens which were accustomed to pass over it, is, in our opinion, quite sufficient. The plaintiff deduces his right to damages from a tortious breach of the defendants' duty, which, he avers, has caused the injury of which he complains. If there be circumstances connected with the injury, showing that it is to be attributed to some fault of the plaintiff, it is for the defendant to set them up in defence. It is not required that a plaintiff should, by his averments, negative every conceivable fact which might militate against his recovery. He is only bound to make out affirmatively a *prima facie* case for damages; and this he has done in the case before us, if, indeed, the action for damages will lie in such a case against the corporation.

2. As respects the sufficiency of the third count: The seventh section of the act incorporating the city of Wetumpka, declares, "That the mayor and aldermen shall have power to pass by-laws and ordinances, necessary and proper to prevent contagious and infectious diseases from being introduced into said city, and to preserve the health thereof, and to prevent and remove all nuisances at the expense of the person causing such nuisance, or upon whose property it may be found," &c. The declaration avers, that the street on which the bridge was erected, was not a public street or highway duly established as such, but that it had been kept open for the use and benefit of all persons, travelling to and from certain public warehouses for the storage of cotton &c., and was of great use; and it also avers, that said defendant, neither in its corporate nor in any other capacity, had any right or power to control or manage the said street or way; that nevertheless it erected, or caused

to be erected and continued, a certain bridge on said street, which became, by reason of its rotten and unsafe condition, a nuisance, and that the injury to the plaintiff's property was received by its falling through while he was crossing it with his wagon and team. The gravamen of this count, if we rightly understand it, is not that the corporation improperly or carelessly erected the bridge, but that it failed to abate it after the same had become so unsound and rotten as to be a public nuisance. As the bridge was on private property, (the count positively negativing the idea of its being on a public highway, and failing to show a public use of it for so long a period, as to amount to a dedication of it to the city,) if the corporation had torn it down as a nuisance, it would have been liable to the owner of the property in the event it had turned out not to be such; and the resolve of the corporation for its abatement would have furnished to it no protection. But before it could be abated by the city authority, as a nuisance, the question must first be settled by the corporation that it was such nuisance; and this involved the exercise of judicial power, the failure to exercise which properly, in the absence of malice or corrupt intention, constitutes no ground of action. We are of opinion, therefore, that the third count was bad. Unlike the other counts, it avers no duty on the part of the corporation to repair the bridge, but places it beyond its jurisdiction, except upon the ground of its being a nuisance.

3. But it is also insisted, that, conceding the liability of the corporation to keep the streets and bridges in repair, yet this general liability does not necessarily require that this particular bridge should be kept up; for, *non constat*, the street was better without than with it; and moreover, it does not appear but that there was a good way around the bridge, rendering it unnecessary to pass over it.

These and all similar objections are answered, by the allegation in the counts that it was the duty of the corporation, resulting from their organic law, to keep up this particular bridge. If the bridge was unnecessary, and the corporation had determined to dispense with it, there being a good way around it, this would constitute a defence, and would go to negative the allegation that the corporation had failed to discharge its duty in suffering it to go to decay; but being mat-

ter of defence, it was for the defendant, and not the plaintiff, to bring it to the notice of the court and jury. Whether the highway could have been passed without going over the bridge, is not the question presented, or required to be presented, by the plaintiff. He says, this bridge was a part of the street, and it was the duty of the defendant to keep it in repair, and in consequence of a tortious or negligent breach of this duty by the defendant, the plaintiff's property has been destroyed in an attempt to pass over it. He thus shows the injury complained of to be the proximate result of the defendant's breach of duty, which renders his right of action complete, if such action will lie; and whether or not it will, is the only remaining subject of inquiry.

4. It is too well settled, by an unbroken current of authority for many years past, that an action on the case for a tort may be maintained against corporations, as against individuals, now to be controverted.

At an early period in the history of corporations, it was held, that such actions could not be maintained. Indeed, at one time it was much doubted whether assumpsit would lie against a corporation aggregate, since, it was said, it could only bind itself under seal; and such was the decision in Breckbill v. Turnpike Co., 3 Dall. 496. But when it was suggested that, being impersonal, and having no hand, it could not affix a seal, and must therefore contract with some agent to act for it in that behalf, the old doctrine was abandoned; for, if it could not act without a seal, it could never act at all, as it can only act through an agent, which it could never create, in the first instance, under seal. The principal difficulty we have had in this case, is, in determining as to the nature of the liability of the defendant in respect to the failure of duty and negligence charged against it, considered in connection with the law of its organization; in other words, whether the duty alleged to have been negligently and tortiously violated, grows out of, and forms a part of, those powers in the exercise of which the corporation acts as a legislative body, or whether such duty does not involve the exercise of its governmental functions. To illustrate: Power is given to the corporation to pass by-laws and ordinances, necessary and proper to prevent contagious and infectious diseases; but the passage of such by-laws and ordi-

nances involves the exercise of legislative power, and although it is the duty of the corporation to pass them when an emergency shall render them necessary, still no action on the case would lie for a failure to perform such duty, at the suit of any one who may have sustained injury from such diseases. This is a public, governmental power, with reference to which the corporation may exercise a sound legal discretion. On the other hand, where a particular duty is positively enjoined, and no discretion is vested in the corporation, as to whether it will or will not perform it, (as if the city or municipal corporation, in consideration of certain exemptions and immunities, such as from working on roads and highways, &c., is positively required to keep the highways in said city in repair,) and, having the means for performing this duty, the corporation wilfully or negligently fail to perform it, in consequence of which failure an extraordinary injury happens to an individual, we see no reason why an action will not lie as well against it as against an individual, for a similar omission of duty which works an injury to another.

The case before us falls directly under the principle we have laid down; for, by its act of incorporation, it is declared that "the inhabitants of the said city shall be excused from working on roads and highways out of the said city, and from patrol duty, except under authority of said city; but the streets and highways of said city shall be kept in repair by said city," &c. —See Acts of Ala. 1839, p. 47 § 11. We must judicially take notice of this act, as a part of the public law, as though it had been set out in each count in the declaration.—State v. The Mayor and Aldermen of Murfreesboro', 11 Humph. R. 212.

The tendency of the modern decisions is, to hold corporations liable, like individuals, for tortious violations of duty, not involving governmental powers, and to disregard the distinction which has sometimes been taken between what is termed misfeasance and non-feasance. We are of opinion that there is, in such cases, no solid distinction between a tortious neglect of a known, defined duty, which is of such a character as not to involve governmental powers, and the performance of such a duty in so unskillful and negligent a manner as to cause particular or extraordinary injury to another. The consequences to the party injured are the same, whether they result from misfeasance or non-feasance.

We have looked into a number of cases, bearing upon the question of the liability of corporations for omissions of duty similar to the one now under consideration, and without extending this opinion by citing them, we feel satisfied that the weight of authority is in favor of sustaining the right of action. The case of Meares v. The Commissioners of the Town of Wilmington, 9 Iredell R. 73, 80, very clearly shows that the power, or rather the duty, enjoined upon the corporation, to repair, is not one of those public, gratuitous duties for which the corporation should not be held responsible; it receives an equivalent in the immunities granted to it.

The judgment must be reversed, and the cause remanded.

GOLDING *vs.* GOLDING'S ADM'R.

1. An instrument, in form a deed, containing a clause of warranty, attested by two witnesses, and conveying realty and personalty by the words "at my death I do hereby give and grant unto my son," *held* a deed, and not a will; the evidence showing that it was delivered to the grantee, who was a cripple. on the day of its date, and that it was intended as a present provision for him, to induce him to continue to live with the grantor, his mother.
2. An adminstrator of a solvent estate may, in this State, maintain ejectment for the lands of his intestate.

ERROR to the Circuit Court of Russell.

Tried before the Hon. JOHN GILL SHORTER.

EJECTMENT by Bryant Duncan, as administrator of Catharine Golding, deceased, against William A. Golding, the plaintiff in error, to recover the possession of a tract of land containing eighty acres, as well as damages by way of mesne profits for its detention. The defendant claimed title through the plaintiff's intestate, under the following instrument of writing:

"The State of Alabama, } Know all men by these pres-
Russell County, } ents, at my death, that I, Catharine Golding, do hereby give and grant unto my son,

William A. Golding, my negro woman Silvey and her son Shade, which I believe to be worth about nine hundred dollars; also, eighty acres of land, worth about four hundred dollars, for which I hereby warrant and defend, from the balance of my heirs, executors, administrators and assigns. In witness whereof, I, the said Catharine Golding, have hereunto set my hand and seal, January 24th, 1852.

LEVI GOLDING, [Seal] her
CATHARINE X GOLDING."
MITCHELL GOLDING, [Seal.] mark.

The defendant proved the execution and delivery of this instrument on the day of its date, by the subscribing witnesses, who further testified that it was executed under the following circumstances: William A. Golding, the grantee, is a cripple and the son of said Catharine; at the date of the instrument he was living with her, but, about that time and previously, he spoke of leaving her house, and going to live with a brother with whom he had formerly resided; on the day when the instrument was executed, his mother promised him that, if he would live with her until she died, she would give him an instrument which would secure to him at her death, if she died before he did, her land and negroes; the defendant assented to this proposition, and immediately drew up the instrument above set out, which his mother forthwith executed and delivered to him.

It was further proved, that the defendant did live with his mother until her death, which occurred on February 2d, 1852; that, at the time said instrument was executed, said Catharine was in her usual health, which was infirm; that she requested her son not to exhibit the instrument until after her death; that he did not exhibit it until the appraisement of the estate, at which he claimed the property, but showed the instrument to one person only, and he was a stranger to this suit; that it was not shown to the administrator until after the institution of this suit. Upon this proof, the defendant offered to read the instrument in evidence to the jury, but the plaintiff objected; the court sustained the objection, and the defendant excepted.

The plaintiff offered in evidence the record of his appointment as administrator of Catharine Golding, deceased; but defendant objected to its admission, because it did not show that plaintiff had given bond, or done any other qualifying act as

administrator. The objection was overruled, and the defendant excepted.

This being all the evidence in the cause, the court charged the jury, that the evidence showed sufficient authority in the plaintiff to sue in the character of administrator of Catharine Golding; that, as such administrator, he had *eight* months within which to receive claims against the estate, and if he instituted this suit within that time, and his intestate had title to the land, he had the right to recover of the defendant the possession of the land, even though it did not appear affirmatively that there were any debts due by said estate; and that, if they found a verdict for the plaintiff, they must assess the value of the rents and profits against the defendant from the service of the writ; to which charge the defendant excepted.

The errors assigned are: first, the ruling of the court in excluding said instrument from the jury; second, the overruling of defendant's objection to the record showing plaintiff's appointment as administrator; and, thirdly, the charge given.

Hilliard & Thorington, for plaintiff in error:

1. The court erred in excluding the instrument offered from the jury. It was a deed: it conveyed to the grantee an actual interest and an immediate estate, only reserving to the grantor the enjoyment of the property during her life: it took effect immediately, and not *in futuro*; the delivery perfected it, and passed the title to the grantee.—Adams v. Broughton, 13 Ala. 731; McRae v. Pegues, 4 *ib.* 158; Simmons v. Augustin, 3 Porter 69, 94; Harkins v. Coalter, 2 *ib.* 263; Florida Rep. 63, 88; 7 Har. & J. 257; 9 Gill & J. 77; 1 Bailey 100; Williams v. Ward, decided by the Supreme Court of Tennessee, at April term, 1853, and reported in Law Magazine for January, 1854.

2. The record of the plaintiff's appointment as administrator ought not to have been admitted, as it did not show that he had given bond, or even qualified.

3. The charge is erroneous. An administrator is not entitled to the lands: they pass to the heir. They are, of course, subject to the payment of debts; but the administrator could not obtain possession of them, until he had taken the regular steps in the Probate Court, for the purpose of collecting the

rents and profits.—Parsons' Com. 154; Chighizola v. Le Baron, 21 Ala. 406.

GEO. D. HOOPER and BELSER & RICE, *contra*:

The instrument excluded from the jury was testamentary in its character. True, it was delivered; the beneficiary was in life, and might have been the recipient of a deed. But the expressed view of the testatrix was, that it should only operate in the uncertain event of her dying first: there still remained the *locus penitentiæ*. Then again, on the face of the instrument, not only the possession and use of the property did not pass till death, but the property itself did not pass till death. The ruling of the court is sustained by the following authorities: Shepherd v. Nabors, 6 Ala. 632; Dunn and Wife v. Bank of Mobile, 2 *ib.* 153; Austin v. Young, 2 Kelly 41; Walker v. Jones, 23 Ala. 448.

The record containing the order of plaintiff's appointment as administrator, shows that he "had duly qualified."

As to the right of an administrator to maintain ejectment, see Masterton v. Girard's Heirs, 10 Ala. 60; Caruthers v. Bailey, 3 Kelly 111.

LIGON, J.—The rights of the parties in this case depend, mainly, upon the construction which the law puts upon the instrument of writing made by Catharine Golding to William A. Golding, which the court below excluded from the jury.

If that instrument is a deed, by which Mrs. Golding conveys to her son the premises in controversy, to be held by him in fee, with the reservation of a life estate to herself, and its terms are such as to pass to him a present interest in the lands in controversy, with the entire estate at her death, then, the court erred in excluding it from the jury; but, if, as it is contended for the administrator, the paper is wholly testamentary in its character, it cannot pass real estate, because there are but two subscribing witnesses to it, when our statute requires three to a will of realty.

In construing this instrument, it must be borne in mind, that there is no controversy here with the creditors of Mrs. Golding, or a subsequent purchaser from her for valuable

consideration without notice, or even a voluntary grantee. It is a contest between her voluntary donee and her personal representative, or, in other words, between the parties to the instrument *exclusively*.

The instrument is, in form, *a conveyance* of the land in controversy, and the operative words, "do hereby give and grant," as well as the clause of warranty, which is in these words, "I hereby warrant and defend, from the balance of my heirs, executors, administrators and assigns, and all other claims whatever, unto the said William A. Golding," &c., are the words of a deed and covenant, and with the exception of "give," are never found in a will. The phrase, "at my death," does not appear to have been intended to operate on the words of gift or grant, or upon the estate intended to be granted, but most naturally refers to and limits the time when the grantee shall enter upon the enjoyment of the estate granted. It presents, then, the common case of a gift by deed of lands, with the reservation of a life estate to the donor.

In all such cases, the fee presently passes to the grantee, upon the delivery of the deed, while the life estate, carved out of it and reserved, remains in the donor: on the death of the donor, the entire estate in the premises immediately vests in the grantee.

Instruments containing, in effect, the words of the one under consideration, have been frequently passed upon in this court and others, and have been almost invariably held to be deeds. In those cases in which they have been held to be testamentary papers, they have been so held to give them effect, and not to defeat their operation. If, as deeds, the law interposes insurmountable obstacles to carrying out the evident intention of the grantor, then they have been held to be testamentary, if in that character the courts could give effect to such intention; on the contrary, if, by investing them with a testamentary character, the intention will be defeated, they will be held to be deeds to give them effect. To hold that this instrument is a will, would be wholly to defeat the intention of Mrs. Golding as to the real estate; for it could not pass lands, as it wants the statutory number of witnesses.

In Dunn and Wife v. Bank of Mobile *et al.*, 2 Ala. 152, the instrument was in form a deed, and called such ; yet, as its purpose seemed to be testamentary, and the evident design and intention of the grantor could not be carried out unless it were established as a will, this court declared it to be such, and thus gave it effect.

In Shepherd *et al.* v. Nabors, 6 Ala. 634, the instrument was in form and name a deed; but the court invested it with a testamentary character, to carry out the evident intentions of the donor. It would swell this opinion to too great length to enumerate all the cases of a similar character with which the books abound.

On the other hand, in the cases of Simmons v. Augustin, 8 Porter 69, and Adams v. Broughton, 13 Ala. 731, in which the instruments were very similar to the one in this case, they were held to be deeds, to give them effect, and to carry out the intentions of the grantors, which would have been otherwise defeated. To the same effect are the cases of Caines and Wife v. Marley, 2 Yerger 584 ; Same v. Jones, 5 *ib.* 254 ; and Williams v. Ward, decided by the Supreme Court of Tennessee at April term, 1853, and reported in the Law Magazine for 1854. It is worthy of remark, that, in the first of these cases, the court at first held the equivocal instrument to be a will; but, upon reconsideration, it changed its opinion, and ruled it to be a deed, in order to carry out the intentions of the maker.

In Horne's Ex'rs v. Gartman, 1 Florida 63, which is quoted approvingly, and relied upon by this court in the case of Adams v. Broughton, *supra*, the instrument contained the words both of a will and a deed, inartificially thrown together. There was also a will, in due form, revoking the instrument, and giving the slaves conveyed by it to other persons. The executors sued Gartman for them ; but the court held the instrument to be a deed, and consequently irrevocable, remarking, that " if it was the intention of the grantor it should operate as a deed, and it is not legally impossible it shall so operate, his intention should prevail." The court held it to be a deed, to give it effect, and to take it out of the clause of revocation contained in the will of the grantor, which would otherwise have defeated it.

Upon a review of all the cases, our conclusion is, that where an instrument is rendered equivocal in its character by being inartificially drawn, and its execution is perfected by delivery, the courts, to prevent the intention of the maker from being defeated, and to give it effect, will hold the instrument to be a deed. But we have been unable to find any case, in which the inartificial arrangement of the words of the instrument has been relied upon or permitted to defeat that intention, and render the instrument inoperative and nugatory.

Were we to hold this instrument to be a will, we should not only run counter to this settled and well established rule, but defeat the humane provision which an aged mother has made for an unfortunate and crippled son.

The proof of the subscribing witnesses to this instrument, leaves us in no doubt as to the intention of the parties to it, and fully explains any latent ambiguity which may have supervened by the use of the words "at my death," as they were used in the instrument itself. Concurrently with the making of the instrument, the donor declared that her intention was *to secure* the property to her son, and the consideration was that her son was to remain with her as long as she lived. It is evident that Mrs. Golding, at the time the deed was signed, had not the least idea of making a will, or any instrument of a purely testamentary character. Her purpose, as avowed by herself, was, *at that time to secure* the property to her son, if he outlived her. A will, which she could revoke at any subsequent time, at her own pleasure, would not carry out this intention; but a deed, signed and delivered, could and would. Yet, in that deed it was necessary to reserve her life interest in the property, by the use of words which would effect this object, and hence the words "at my death" occupy a prominent place in the instrument, while the body of the paper under consideration contains every word necessary to make a good deed, without the use of a single one which is peculiar to a will. It is true, if the words "at my death" had been differently placed, the meaning of the grantor would have been more pointedly and unequivocally expressed; but mere awkwardness in the arrangement of words in a deed, which does not make it contradict

the avowed intention of the grantor at the time it was executed, will not be allowed to defeat that intention altogether. In such cases, if the words of the instrument, by a reasonable construction of them, can be made to carry out the expressed intention of the maker, the courts will not hesitate to place that construction upon them.

The operative words of the instrument under consideration, as we have already said, are those of a deed, and these must be allowed to fix its character. These agree with the oral proof in the case, as to the intentions of Mrs. Golding, and stamp the paper unmistakeably with the character and properties of a deed.

The only remaining question which we deem it necessary to pass upon, is, as to the right of an administrator, in this State, to bring ejectment against an adverse holder of the lands of his intestate. The action of ejectment is a possessory action, and may be brought by any person against whom the possession of lands is unlawfully held by another, especially in cases in which the summary proceedings by forcible entry and detainer, or of unlawful detainer, will not lie.—Under our statute, the administrator of a solvent estate is entitled to the rents and profits of the real estate of his intestate, until distribution is made. It has been also held, that he is entitled to the rents in arrear at the death of his intestate.—Harkins v. Pope, 10 Ala. 493. Being thus entitled to all the rents of the premises, the administrator must, of necessity, be entitled to all the needful remedies to enforce his rights; for, when the Legislature conferred the right to the rents accruing on the real estate of the intestate on him, it gave him, by implication, every other right or power necessary to render this right effectual. Among these are included the right to the possession of the lands, and the right of action to recover that possession, if unlawfully withheld from him. The rule is different where the estate is insolvent, as may be seen by reference to the case of Long *et al.* v. McDougald's Adm'r, decided at the last term. The estate of Mrs. Golding does not appear to be insolvent, and her administrator might well maintain ejectment in a proper case.

There was, therefore, no error in this part of the ruling of

the court below; but for the error in excluding the deed from the jury, the judgment must be reversed, and the cause remanded.

STEIN *vs.* BURDEN.

1. A legislative grant to an incorporated company, conferring upon them "the exclusive right and privilege of conducting and bringing water for the supply of the city for the term of forty years," gives them no right to divert the water of a running stream, to the injury of riparian proprietors, without making compensation.
2. An act authorizing the lessee of certain city water works to sue out a writ of *ad quod damnum*, to ascertain the damage sustained by riparian proprietors from his diversion of the water of a running stream, does not deprive a riparian proprietor of his common law action for damages, on the lessee's failure to sue out the writ.
3. A municipal corporation, owning lands on a water course from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of the other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants.
4. A witness who is well acquainted with the mill business, cannot give his opinion as to the damage sustained by plaintiff by a diversion of the water from his mill, when he is not informed of the size of the stream, its supply of water, or the quantity diverted.
5. No recovery can be had, except by a new action, for damages accruing subsequent to the commencement of the suit; but evidence is admissible to show the effect after suit brought of a diversion of the water, with the view of affording information to the jury of the effect of the diversion under similar circumstances before suit brought.
6. Actual possession under claim of title is sufficient to sustain an action on the case for diverting water from a mill; and therefore evidence showing that plaintiff had no title to the land on which the mill was situated, is inadmissible.
7. A riparian proprietor is entitled to nominal damages for a diversion of the water from his mill, without any proof of actual damage.
8. The uniform and uninterrupted diversion of water from a running stream for a period of twenty years, gives a title by prescription: it is not necessary that the water should be used in precisely the same manner, or applied in the same way; but no change is allowed which would be injurious to those whose interests are involved.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

ACTION ON THE CASE by John Burden against Albert Stein, to recover damages for defendant's alleged diversion of the water of the Three Mile Creek from plaintiff's mill. On the trial, the plaintiff proved possession under a claim of title to a tract of land on each side of the creek opposite to each other; that in 1849 he had erected a mill on the tract on the north side of the creek; that the defendant had diverted the water above the point where the mill was located; that in 1837 one Jacob Page, who then owned the land, had built a mill on the same site. One of the witnesses examined on the part of the plaintiff, to prove the amount of the damage, "stated that he had owned two mills, and was well acquainted with them, and that, in his opinion, plaintiff was very greatly damaged" by the diversion of the water. The defendant objected to the admission of this evidence; but his objection was overruled, and he excepted.

"The plaintiff also offered evidence tending to show that, at divers times since the commencement of the suit, his mill was compelled to stop grinding for the want of water, and that this was attributable, in part, to the aforesaid diversion of the water by the defendant; which evidence the defendant objected to, upon the ground that it related to matters and facts since the commencement of the suit." The objection was overruled, and the defendant excepted. "The plaintiff also offered evidence tending to show that, at a dry season, in a very low stage of water, long since the commencement of the suit, the defendant then diverted, by the means aforesaid, about one third or one half of the quantity of water then in the creek; to which evidence the defendant objected; but his objection was overruled, and he excepted." The plaintiff also offered in evidence a deposition taken in his behalf on the 7th June, 1852, a portion of which is as follows: "In consequence of the scarcity of water, the wheat rock does not run at all; the corn rock, for the same reason, cannot be run more than one third of the time." The defendant objected to this part of the deposition; but his objected was overruled, and he excepted.

The defendant claimed a right to divert the water, under the

act of December 20, 1820, incorporating the Mobile Aqueduct Company (Toulmin's Dig. 793); the act of December 24, 1821, (Pamphlet Acts, p. 76); the act to incorporate the Mobile Aqueduct Company, approved December 25, 1837; the act of January 7, 1841 (Pamphlet Acts, 1840, p. 53); and the act of December 25, 1841, (Pamphlet Acts, 1841, p. 5); and also under articles of agreement between himself and the Mayor and Aldermen of Mobile, making him lessee of the City Water Works. He also offered evidence tending to show, "that he and those under whom he claimed had diverted the water of said creek, in the manner and to the extent of his diversion, for more than twenty years next before the commencement of this suit; but that prescription, if any, did not begin before the year 1828; and that such and said diversions of said water, during the whole of said period, had been open, notorious, continued, adverse, and without interruption; and, further, that said portion of said water, during said period, had been diverted for the culinary and domestic purposes of the city, and had been so used by said city and its inhabitants in reasonable quantity."

The defendant also proved that the corporation of the city of Mobile was the owner of lands on said creek, above the point where plaintiff's mill was located; and that he owned lands on said creek at the point where the water was diverted, adjoining the lands of said corporation. He also offered to show that plaintiff was not the owner of the lands to which he had shown a *prima facie* title, and on which his mill was located, but that they belonged to the heirs of Joseph Chastang, deceased, who had commenced a suit against him for their recovery; but this evidence was excluded by the court, on plaintiff's motion, and defendant excepted.

The defendant, amongst other charges, requested the following:

1. That, if the acts of the Legislature, under which defendant claimed the right to divert the water, were wise sanitary regulations, necessary for the health and safety of the city of Mobile; and if the defendant, in diverting the water, took to the city, for its use, only so much as was necessary and proper for the accomplishment of that object, doing thereby no unnecessary damage to the plaintiff, then no recovery could be had,

although plaintiff had received no compensation for the injury which he had sustained.

2. That to render the defendant liable to damages, he must have exceeded the powers conferred by the statute creating and establishing the City Water Works.

3. That the statutes enabling the defendant to effect a great and beneficial public object, should be liberally construed in his favor; and that, therefore, he was not liable for any consequential damage resulting from the acts done within the terms of the statute under which he acted.

4. That the Legislature having granted to the Mobile Aqueduct Company, in 1820, the right to use the waters of the Three Mile Creek to supply the city with water, and the plaintiff having acquired title to his lands after the grant of such exclusive privileges, he was bound thereby.

5. That the acts under which the defendant claimed, conferred on him a right to take the water for the supply of the city of Mobile.

6. That, if the possession of the City Water Works had been with the city authorities, and those claiming under them, for twenty years prior to the commencement of the action, a grant of the use of the water must be presumed.

7. That by the act of 1820, and the subsequent legislation on the subject of the City Water Works, the defendant was authorized to take the water from the Three Mile Creek.

The court refused all of these charges except the second, which was given with this qualification: that the statute referred to did not authorize the commission of an injury to any private individual. The court charged, in substance:

1. That the possession of the lands by the plaintiff, under a claim of title, constituted him a riparian proprietor, and gave him the right to maintain his action for damages against any one who unlawfully diverted any portion of the water from the creek.

2. That the several statutes on which defendant relied were constitutional, but they did not authorize the diversion of any portion of the water of said creek for the purposes specified in said acts, without making compensation therefor to the riparian proprietors; and that if defendant diverted any portion of the water, at any point above the lands of which plaintiff was pos-

sessed, and took and applied the same to the culinary and domestic purposes of the city of Mobile, he was liable for at least nominal damages; and if the plaintiff sustained any special damage in the operation of his mill, he was entitled to recover to the extent of the injury sustained.

3. That the fact that the corporation owned land on the creek, did not authorize the city to bring into its corporate limits any portion of the water, to be therein consumed for culinary and domestic purposes; and that the defendant, as the agent of the city or lessee of the City Water Works, had no right to divert and convey to the city any portion of the water for its domestic use.

4. That the defendant cannot set up in defence to this action a prescriptive right to the use of any portion of the water of said creek, unless his adverse possession and enjoyment thereof had continued for twenty years next before the passage of the statute of limitations of February 7, 1843.

5. That notwithstanding the articles of agreement and the several statutes in evidence, the common law remedy of an action on the case still remains to plaintiff, and he is entitled to maintain the same against the defendant, for any diversion of the water for the purposes specified in said acts, although a mode is thereby provided for the assessment of damages.

The rulings of the court upon the evidence, the charges given, and the refusal to charge as requested, are now assigned for error.

F. S. Blount, Wm. M. Brooks and C. W. Rapier, for plaintiff in error:

Can Burden recover damages from Stein for his diversion of the water from the Three Mile Creek under the authority granted to him by the Legislature? The consideration of this question involves an inquiry into the rights of sovereignty of the State. That the State assumed the right of eminent domain over the navigable rivers and water courses within its limits, and the right to legislate thereon, is manifest from the acts passed on these subjects in 1820.—Toulmin's Digest, p. 702 to 717. It is obvious from the act of December 20, 1820, that the Legislature regarded the waters of the Three Mile Creek as a part of the public domain, because they made no provis-

ion for the riparian proprietors who might be injured by the diversion of the water granted to the Aqueduct Company; nor does the law provide for compensation to the owners of lands through which the ditch or canal is to be dug. Running water, independent of any legislation on the subject, being of the eminent domain of the State, the right of it is vested in the Legislature. The legislative grant, without compensation, was the exercise of sovereignty over the water running in the creek. The soil was in the owner of the freehold. He has no property in the water itself, but a simple usufruct while it passes along. 3 Kent's Com. 439. This being the property of the public in common for the use of all, the State, by virtue of its sovereignty, may dispose of the use for public purposes, without interfering with the title to the soil. This is emphatically a health law, and is so declared in its preamble. The principle is based on the maxim, "*Salus populi suprema est lex:*" it is applied to cases where the rights of the community require that absolute rights of individuals should be sacrificed, without compensation, if necessary to the end to be obtained. The abatement of public nuisances,—the destruction of private buildings to stop the ravages of fire,—quarantine laws, and others of a similar nature, all may be referred to this class; in all such cases, private property is taken without compensation, nor would a claim for compensation be entertained by the courts.—5 Howard's U. S. R. 558, 559. The principle is sustained upon the well known doctrine, derivable from the maxim above quoted, that, in entering into social government, each individual tacitly consents to be deprived of a portion of his absolute rights, whenever necessary to the security, happiness, welfare and prosperity of the mass. "A familar instance of the exercise of this power," says Ruffin, C. J., "is the levying of revenue, by taking from the citizen, from time to time, such portion of his property as may be requisite to conduct the government."—Railroad Co. v. Davis, 2 Dev. & Bat. 456. "It is by virtue of this power a State legislates; and its authority to make regulations of commerce, is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution."—C. J. Taney, in 5 Howard's U. S. R. 582, 583.

Is Mr. Stein liable for damages while acting under the authority of a law intended for the preservation of the public health,

and not exceeding the powers conferred on him? In no case can a person be liable to an action as for a tort, for an act which he is authorized by law to do.—Callender v. Marsh, 1 Pick. 434. "This not being a direct invasion of private property, but remote and consequential merely, and arising from a public improvement, the injury is one to which individuals must submit, as the price of the social compact; and in the eye of the law the injury is *damnum absque injuria*."—Lansing v. Smith, 8 Cowen 146. In the case of Meredith v. Plate Glass Co., 4 Term R. 794, Lord Kenyon says: "If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. If the Legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction." See, also, on this point, Boulton v. Crowther, 9 E. C. L. R. 227; Hollister v. The Union Canal Co., 9 Conn. 436; 7 Johns. Ch. 344; 11 Mass. 365; 4 Wend. 648.

If necessary to sustain the validity of the act incorporating the Aqueduct Company, and withholding compensation to parties supposing themselves aggrieved by the taking of private property for public uses, it may be fully sustained by referring it to the power, inherent in State sovereignty, to make police laws. The definition of this power is furnished by the Supreme Court of the United States, in the case of New York v. Miln, 11 Peters 104.

The act is not unconstitutional for want of a provision making compensation for private property taken for public uses. This was not private property at the date of the act: the United States were the owners of all the lands below the water works on the creek, including Burden's, at the time of the grant to the Aqueduct Company. If the grant was in derogation of their rights, our constitution does not provide compensation: its provision is limited to persons, not sovereignties.—Const. Ala. Art. I, § 13. Like all the restrictions laid on the exercise of sovereign authority, it was intended for the security of the citizen. The purchaser from the United States acquired the same rights that the United States had; and this court has defined them to be no other or greater than when the grant is to an

individual.—Hendricks v. Johnston, 6 Peters. There being no constitutional restriction in favor of the United States, against the exercise of the right of eminent domain by the State, in appropriating the waters of the Three Mile Creek without compensation, the defendant in error cannot claim such compensation.

The authority to divert this water was granted in 1820; and conceding that Burden's vendor obtained his title in 1829, and conveyed the same to him in 1849, yet, previous to that time, the title was in the United States, and there were no private rights in existence to be violated. At all events, there is no evidence that any parties, claiming an interest in the waters of the creek, have for thirty years made any claim for compensation.

The bill of exceptions shows, that the defendant proved on the trial, that for more than twenty years next before the commencement of this suit, (but that prescription, if any, did not begin before the year 1828,) and that said and such diversions of said water had, during the whole of said period, "been open, notorious, continued, adverse, and without interruption." And upon this testimony the court charged, "that the defendant cannot successfully set up, in defence of this action, a prescriptive right to the use of any part of the waters of said creek, unless his adverse possession and enjoyment thereof had continued for twenty years next before the passage of our statute of limitations of February 7, 1843." The presumption of an easement or private right, after the expiration of twenty years, is merely in analogy to the statute of limitations, and not by virtue of it: it is wholly independent of statutory enactment; it only arises in the absence of opposing testimony. In this case, it is not within the limits of the statute of limitations, and is wholly unaffected by the period of their enactment or repeal. Ricard v. Williams, 7 Wheaton 59; 2 Phil. Ev., C. & H. Notes, 380 to 384.

The case cannot be considered as presenting a question as to the taking of "any person's property," at the date of the grant of the franchise; and, if so, no title subsequently obtained can affect the grant or contract then made: rights acquired after the grant are taken in reference and subjection thereto. The lapse of thirty years from the date of the grant,

without question or interruption, presupposes that there were no persons to claim compensation, or, if there were, creates the presumption of abandonment; in either case, the right has become perfect.

Conceding, for the sake of the argument, that the defendant was a riparian proprietor at the date of the grant, the question would arise under the act of 1820, Is this a taking of private property? The word "taking," as used in the constitution, means taking altogether, not consequential injury to it, which is no taking at all. For compensation for the latter, the citizen must depend on the forecast and justice of the Legislature.—Commonwealth v. Fisher *et al.*, 1 Penn's Pa. R. 467; 1 Watts & S. 346; 7 Barr 348; 7 Cowen 349; *ib.* 585; *ib.* 604; 9 Conn. 436.

Conceding, further, that Burden is entitled to compensation, he must resort to the mode prescribed in the statute for obtaining it.—12 Mass. 466; 11 *ib.* 364; 5 Cushing 537; 2 D. & E. 434; 2 Porter 296.

But if the act is held unconstitutional, yet the evidence shows a perfect title by prescription.—3 Kent's Com. 541 to 543; 2 Phil. Ev. 380; 4 Mason 397.

Every riparian proprietor is entitled to the reasonable use of the water for culinary and domestic purposes; and if one is thereby injured, no action lies: he is without remedy.—8 Mass. 135; 3 Pick. 271; 12 Wend. 332; 15 Johns. 218. The city of Mobile, being a riparian proprietor, is entitled to the same use of the water as any other proprietor; and Stein, being the lessee of the city, succeeds to all its rights and privileges. It is not necessary that the proprietor should occupy his lands on the bank of the stream: he may reside one hundred yards or eight miles distant, as he chooses, and use the water by means of aqueducts.

Burden did not show sufficient title to maintain his action: no one but a proprietor can maintain an action for diverting the water from a creek; and a proprietor is one who has the "dominion of a thing, and the right to enjoy and do with it as he pleases, even to spoil or destroy it."—Bouv. Law Dict. 212.

The court below erred in permitting a witness to testify that, "in his opinion, the plaintiff was very greatly damaged:" he should have stated the facts on which his opinion was founded.

P. & M. Bank v. Borland, 5 Ala. 531; M. & W. P. Railroad Co. v. Varner, 19 Ala. 185.

The evidence of the condition of the stream, and of the injury done to the mill, after the suit was brought, was inadmissible; it did not throw any light on the condition of affairs before the commencement of the suit, and could only tend to mislead the jury; especially so, when the fact is borne in mind, that the stages of water in the creek were different at different times, according as the season was wet or dry.

P. Phillips, *contra*:

Burden's title to the *locus in quo* was derived from an ancient Spanish grant, which was confirmed by act of Congress in 1829, and a patent certificate issued thereon to "the heirs of Joseph Chastang." Victor Gannard, who had intermarried with one of Chastang's heirs, joined his wife in a conveyance of the land to Owen & Lipscomb, in 1834, who conveyed to Jacob Page on the 1st April, 1835. Page executed a mortgage to the Bank in 1837, under which a decree of foreclosure was obtained; and at the sale Burden became the purchaser, and received the master's deed, on the 8th March, 1849. The title to the land on the south side of the creek Burden derived from a patent direct to him in 1847. The evidence showed that possession had accompanied the conveyances referred to, and was held in conformity therewith; that Page, while the owner, some time in 1837, had erected a mill on the present site, which Burden had torn down after his purchase, and buit a new one in July, 1849. No attempt has been made to question this title, and but a very feeble effort to show that Burden is not fully authorized to represent it.

Under this state of facts, what are Burden's rights as a riparian proprietor? It is well settled, that each proprietor, bounded by a water course not navigable, has a right to the use of the water in its natural flow; each may retain it, as it passes through his lands, but cannot divert it. This right is corporeal, —is an incident to the land, and passes with it as a part of the inheritance.—Hendricks v. Johnson, 6 Porter 497; 10 Barb. 518; Clay's Digest 595. The proprietor is entitled to the whole momentum of the fall; any diversion of the water, however small, abstracts a portion of his rights; and for this he may

maintain an action, without proving any special or appreciable damage.—Parker v. Griswold, 17 Conn. 288; 7 Watts & Serg. 9; Blanchard v. Baker, 8 Greenl. 253.

It is not denied that Stein diverts a large quantity of water, which would otherwise flow to the plaintiff's mill; and the next inquiry, therefore, is, whether he has shown any justification of an act, which, under the ordinary rules, would constitute him a trespasser. To simplify the case, it may be admitted that he occupies the same position as the original corporators of the Mobile Aqueduct Company. The act of incorporation (Toulmin's Digest, page 793) nowhere purports to grant the water, or the right to use the water. The water privilege is frequently the most valuable portion of a riparian possession; and if it were admitted that the State had the right, in the exercise of its sovereign power, to take it from the owner, and transfer it to another, without compensation, the court would not act upon slight implications and ingenious constructions, but would require clear and positive words to that effect.—Broom's Leg. Max. 4; 12 Mees. & W. 540. There is, however, no ground upon which to predicate such a construction of the act upon implication. The expression "authorized and empowered" confers, and was intended to confer, no other right than to do the act in a *corporate* capacity; this corporate right was petitioned for, and was granted. In the frequent acts incorporating railroad companies such a right is usually granted; the company is authorized and empowered to construct a road from one point to another; but this does not convey a right to the land over which the road passes. So, in this case, the right to convey did not carry with it a right to the thing conveyed. Having granted to the company, in its corporate capacity, the right to conduct the water to the city for forty years, it was left to make its own terms for the purchase of the water. If the Legislature intended to take away so valuable a right as this, it is but justice to them to presume that they would have provided some compensation; and the second section of the act, requiring compensation to be made to the owners of the land through which the canal passes, shows that they are not unmindful of private rights. The fact, too, that the act of 1841 provides a mode by which damages might be assessed for Stein's diversion of the water, (an act wholly inconsistent with the idea that the

right to the water had been granted without compensation by the previous act,) is an additional argument in favor of this construction.

The second section of the act of 1820 contains this stipulation: "*provided*, that the corporation shall, before the expiration of three years from the passage of the act, cause the said water to be conducted into the said city," &c. If, then, the act was a grant of the water, this proviso expresses a condition, the performance of which could alone entitle the corporators to the rights and privileges of their charter.—Crabb on Real Property, p. 801, § 2140 a; Dyer 311; 21 Ala. R. 88. The defendant admits that this condition has not been complied with, yet insists that no one but the State can take advantage of it. But the condition is clearly precedent; and not having been performed, no corporate right ever vested in the company, and it has no standing in court to enforce such right.

If, however, the act could be construed as granting the right to this water, without compensation, for great public benefit, it would be unconstitutional and void, and would afford no protection to the defendant against this action. Our bill of rights declares, that "property shall not be taken or applied to public use, unless just compensation be made therefor."—Const. Ala. Art. I, § 13; Code Napoleon, Art. 545; 2 S. & P. 217; 2 Johns. Ch. 162; Lyon v. Jerome, 26 Wend. 493; Bloodgood v. Railroad Co., 18 Wend. 75; Smith v. Helmes, 7 Barb. 426; Thatcher v. Dartmouth, 18 Pick. 503; Baker v. Boston, 12 Pick. 94; Perry v. Wilson, 7 Mass. 365. And Chancellor Kent says, the better opinion is, that the offer of compensation must precede or be concurrent with the seizure and entry upon private property under authority of the State.—Kent's Com., 2 vol., p. 339.

It is again contended, that Burden's right commenced only with his purchase in 1849, or, at most, related back to the date of Page's mortgage and purchase in 1837; and that, as the right to grant the water was exercised by the State prior to that time, he purchased *cum onere*, and is not in a situation to complain. This is not true; Burden holds all the right which was vested in Chastang's heirs under the Spanish grant in 1794. That this was not confirmed by Congress until 1829, is of no consequence to the argument; as between the holders of

the title and the United States, it may have been treated as an imperfect or inchoate title; but as between them and any other persons, the title was perfect, and could not be invaded. The United States was owner of the vacant lands in this Territory, and this ownership was confirmed by an ordinance irrevocable at the adoption of the State constitution. In the the acquisition of that portion of the Territory south of latitude 31°, the Government became bound to perfect such titles as had a *bona fide* incipiency under the preceding dominion; and when such action takes place, the title by relation is made perfect *ab initio*. But suppose that the title to the *locus in quo* had vested exclusively in the United States when the act of 1820 was passed. It would then hold this proprietary interest in the same manner that an individual holds similar property. It exercised no political jurisdiction in virtue of the possession, nor any governmental junctions; these belonged to the State exclusively, while the lands themselves, with all the rights of property attached, belonged to the United States. The defendant, therefore, gains nothing, if he succeeds in showing that the lands belonged to the United States when the State made the alleged grant. The State cannot be justified in seizing on the running water of a stream, (which is regarded as part and parcel of the freehold,) whether it belongs to the United States or to an individual; the State can pass no act the effect of which would be to deteriorate the value of the public lands.—Bullock v. Wilson, 2 Porter 250. The right of "eminent domain" can only be exercised by the State upon making just compensation; and this right of the State is not enlarged by the peculiar character of the subject now in controversy. In this country, small streams which are not boatable, that is, cannot, in their natural state, be used for the carriage of boats, rafts and other property, are wholly and absolutely private, not subject to the public interest. —See the authorities cited in Angell on Water Courses, § 539. Nor can the Legislature, by an act, declare a river to be navigable which is not so, and thus deprive the riparian proprietors of their right to use the water for hydraulic and other purposes, without making compensation.—Walker v. Board, 16 Ohio 540; Angell on W. C. § 541; 6 Shep. R. 438; 17 Johns. 213.

Failing to justify under the statute, the defendant sets up a title by prescription; but the facts shown by the record fail to

make out such a title. I. To constitute a title by prescription, there must have been an adverse enjoyment or user, for the length of time limited by the statute of limitations for the right of entry on lands. The right to the use of flowing water is not founded in mere user, but is inherent in the land.—Campbell v. Smith, 3 Halst. 139; 4 Rand. 64; 3 Phil. Ev., C. & H. Notes, 381; Angell §§ 134, 308. II. The use must be uniform. To take water for a period from one point of a creek, through a pipe of three inch diameter, does not justify a taking at a different point, through an eight inch pipe; nor can these be connected so as to make out the term required by the statute. —Arnold v. Foote, 12 Wend. 332; 13 Metcalf 429; 3 Phil. Ev. 382. III. Prescription cannot be set up against the United States, nor against its grantee until the legal title was vested in him.—Kennedy v. Townsley, 16 Ala. R. 249. The bill of exceptions shows, that it was *proved* that Stein first took the water from the present point of the creek in 1841–2, and that "the old Aqueduct Company commenced their operations subsequent" to 1828, and drew the water from a savanna on the north side of the creek. As the suit was commenced in 1850, the evidence afforded no ground to sustain a title by prescription; and if the charge of the court on this point was erroneous, this court would not reverse the judgment, the charge being abstract.

The defendant further insists, that, having acted under the sanction of the act, he cannot now be considered a trespasser, even if the act is pronounced unconstitutional. This doctrine is admitted to be true in cases of consequential damage, but not where it is direct.—1 Pick. 434; 8 Cowen 146.

Again; it is said that resort must be had to the mode of compensation pointed out in the act of 1841, and that a common law action does not lie. The act of 1841 authorizes Stein "to apply for a writ of *ad quod damnum*," but does not provide a remedy for the persons suffering the damage; it seems to have been intended for Stein's convenience only. Being in derogation of the common law, the act must be strictly construed. Even where an act points out a remedy, this does not repeal the common law remedy, unless the construction shows that to have been the intention. But the remedy which Burden has pursued is specially conferred by an act passed in December, 1820, (a few days prior to the act incorporating the Aqueduct

Company,) which gives an action against any person who obstructs or diverts any stream of water from its natural channel, in favor of the person thereby injured.

The opinion of the witness, "that plaintiff was greatly damaged," was competent evidence. He gave facts upon which this opinion was founded, and was himself a mill-owner, and well versed in such matters.—13 Metcalf 291; 1 Green. Ev., p. 488, § 440. So, too, the evidence as to the quantity of water which flowed in the creek, and its sufficiency for the working of plaintiff's mill, though stated by some of the witnesses from an inspection made subsequent to the bringing of the suit, was competent; they referred to natural objects, and to causes and effects which are unchanging.

GOLDTHWAITE, J.—The plaintiff in error, Stein, is the lessee of the City Water Works of Mobile, and deduces his right to divert the water of the Three Mile Creek, from the act of the Legislature of 20th December, 1820, (Toulmin's Digest 793,) the preamble to which recites, that it had been represented that it would be advantageous to the health and commerce of Mobile, to be supplied with water from some of the running streams in its vicinity, and that certain persons had agreed to associate themselves together for the purpose of conducting a supply of water from the Three Mile Creek.

The first section incorporates these persons and their assigns, and confers upon the company the usual powers incident to corporations.

The second section gives the company authority to cut a canal, to contain the logs which were to serve as conduits for the water, and to enter upon the lands through which the canal passed, for the purposes of construction and repair; and provides compensation to the owners of such lands for the injuries which they might sustain.

The third section gives to the company the exclusive right of conducting the water to the city, for a term of years, on certain conditions, one of which is, that the canal shall not be carried through any person's land without the consent of the owner.

The other sections regulate the water rates to be charged by the company, and prescribe penalties for injuring the logs in which the water is conveyed, cutting the hydrants, obstruct-

ing the creek above the water works, and using the water in the city without paying for it.

By the act of 1841, all the rights, privileges and immunities granted under the act of 1820, are vested in the plaintiff in error, (Pamphlet Laws 1841, p. 52,) and by the act of 1841 he is authorized to sue out writs of *ad quod damnum*, to ascertain what damages may be sustained by the proprietors of lands on the Three Mile Creek, in consequence of the withdrawal of the water or otherwise.—Pamp. Acts 1841, p. 5.

The first and most material question involved in this case, is, whether the act of 1820 confers upon the company any right to the use of the water in the creek. It does not give this right in express terms, and, if it exists at all, it can only be by implication. One of the probable consequences of using the water for the supply of a corporation like the City of Mobile, would be to impair the rights of the riparian owners below the point where the water was diverted, and, in a greater or less degree, to diminish the value of their property. A just respect for private rights demands that legislative grants should not be so construed as to affect individual property, unless the construction can be sustained upon the express words of the act, or is clearly deducible from it. It would hardly, we apprehend, be contended, that a statute incorporating a company for the purpose of erecting a public hospital, upon lands belonging either to the General Government or an individual, would have the effect of passing the title of the land to the corporation; or, as in the case put by the counsel for the defendant in error, that the right to construct a railroad between two points, would give the right of way, any more than it would the right to use the materials for its construction found along the route. So, if the Legislature should authorize a public improvement by means of a canal, and the construction of the work would destroy or impair the value of private property, without affording the means of indemnification, the owner of the property destroyed or injured would have his action at law against those who caused the damage.—Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466. In the present case, there is nothing in the statute from which the intention of the Legislature to give the use of the water can legitimately be inferred; and the care with which they have guarded the rights of others, in requiring

the consent of the owners of the land through which the canal passed to be given, and providing compensation for the injury which they might sustain, is, at least, persuasive to show that the Legislature intended to grant no right which might be detrimental to others. The right to the use of the water intended to be used by the company, under certain conditions and limitations belonged to the owners of the land through which it run. It is this right which is frequently the most valuable portion of the freehold, and is, in some senses, as much identified with it, as the soil of which it is composed. With the provisions intended for the protection of property which are found in the statute, in the absence of any express provision conferring the right, or any one from which it can fairly be deduced, we must hold that the act of 1820 conferred no authority to divert the water.

The act of 1841 (Acts 1841, p. 5) recognizes the right of the riparian proprietors to compensation for any injury they may sustain by the diversion of the water, and authorizes Stein to sue out a writ of *ad quod damnum* to ascertain the damages; but it confers this remedy upon him alone, and, if he does not pursue it, the proprietors are not deprived of their common-law action, which is, indeed, the only course they could pursue, on the failure of Stein to proceed in the mode provided for by the statute.

It is insisted, however, that the fact that the City of Mobile owned land on the creek, upon the point where the mill of the defendant in error was located, gave to that corporation the right to the use of the water in sufficient quantities to supply the domestic purposes of its inhabitants. That a riparian proprietor has the right to consume even the whole of the water of a stream, if absolutely necessary for the wants of himself and family, has received the sanction of judicial decision, (Evans v. Merriweather, 3 Scam. 496; Arnold v. Foot, 12 Wend. 330;) but if this doctrine be correct, it can have no application in the present instance, because it rests upon reasons which are wholly inapplicable to corporations, which are artificial bodies, and can have no natural wants. There are, however, other considerations which would forbid the extension of this rule to the case before us. The City of Mobile is not located upon the creek:—it is from three to five miles distant. To hold that a municipal corporation can, from the mere fact of owning land

upon a water course, acquire the right to divert the water in sufficient quantities to supply the domestic wants of its inhabitants, residing at a distance of from three to five miles, to the injury of the other proprietors, would be unreasonable in itself, and unjust to those who have an equal right to participate in the benefits of the stream.

On the trial, one of the witnesses for the plaintiff stated, that he had "owned two mills, and was well acquainted with them," and that, in his opinion, the damage sustained by the plaintiff from the diversion of the water was very great. This evidence should not have been admitted. The damage which the party had sustained depended upon the quantity of water diverted by the defendant, and whether its diversion would materially diminish the quantity necessary for the mill of the plaintiff. The fact that the witness was well acquainted with the mill business, would not inform him of the size of the creek, its supply of water, or the amount diverted. He, therefore, did not stand in a situation which would authorize him to give his opinion, as to a result which necessarily involved these questions. The objection to this testimony should have been sustained.

In relation to the evidence showing the effect of the diversion of the water, upon the mill of the plaintiff, we do not think the court erred. We concede that, in this action, no recovery could be had for damages which had accrued subsequent to the commencement of the action, as those damages would properly form the ground of a new action, and, therefore, could only be recovered in that mode.--Robinson v. Bland, 2 Burr. 1077, 1086; Langford v. Owsley, 2 Bibb 215; Hoop. 286; Blunt v. McCormick, 3 Denio 283. But we do not find from the record that this evidence was offered for the purpose of showing the damages since the bringing of the action, but simply the effect at that time of the diversion of the water, with the view of affording information to the jury of the consequences of the diversion, under similar circumstances, before the suit; and in this aspect it was properly admissible.

The evidence offered, on the part of the defendant below, to show that the plaintiff had no title to the land on which his mill was located, was properly rejected. A lessee at will, (2 Roll. Abr. 551; Sid. 647,) and a tenant at sufferance, (*Ib.*; 13 Co. 69;

1 East 245, n. a,) may maintain an action of trespass to real property; and the rules which govern the two actions are, in this respect, analogous. The actual possession, with the claim of title, having been proved, entitled the plaintiff to sue; and for that reason the evidence offered was irrelevant.

We think, also, that the charge of the court asserting the principle, that a riparian proprietor was entitled to damages for any disturbance of his right, without proof of actual damage, was correct. It is the invasion of the right which gives the action, (1 Wm. Saunders 346 b,) and the law, in the absence of any special injury, gives nominal damages, on the ground that the undisturbed enjoyment or continuation of such acts, without the consent of the owner, would ripen into evidence of a right to do them (Young v. Spencer, 10 B. & C. 145; Hobson v. Todd, 4 Term 71; Williams v. Esling, 4 Barr 486); and this doctrine applies to all cases, where the act done is of such a character that, by its repetition or continuance, it may become the foundation of an adverse right.—Bliss v. Rice, 17 Pick. 23; Parker v. Griswold, 17 Conn. 288; Webb v. Port. Man. Co., 3 Sum. 189; Crooker v. Bragg, 10 Wend. 260; Blanchard v. Baker, 8 Green. 253; Ripka v. Sergeant, 7 W. & S. 9; Hulme v. Shore, 3 Green. 116; Welton v. Martin, 7 Missouri 307.

The fourth charge was erroneous. It is the established doctrine, that the exclusive enjoyment of water, or any other easement, in a particular way, for the length of time which is the period of the statute of limitations, enjoyed without interruption, is sufficient to raise a presumption of title, as against a right in any other person, which might have been, but was not, asserted.—Bolivar Man. Co. v. Neponset Man. Co., 16 Pick. 241; State v. Wilkinson, 2 Verm. 480; Cuthbert v. Lawson, 3 McCord 194; 3 Kent's Com., 5th edition, 442.—We have held that the act of 1802, (Clay's Dig. 327 § 83,) which fixes twenty years as the limitation to the right of entry upon land, was not repealed by the act of 1843 (Clay's Dig. 329 § 93; Rawls v. Kennedy, 23 Ala. 240); and this being the case, the uniform and uninterrupted diversion of the water, for twenty years, would give to the defendant in error a title by prescription.

We do not consider it necessary to notice the argument of

the plaintiff in error upon this point, as it would amount to no more than a verbal criticism on the meaning of the word "proved," as it is used in the bill of exceptions; and the case must be reversed for the error previously noticed. It is sufficient to observe, that in order to acquire this right by prescription, the law requires that the mode or manner of using the water, during the period necessary to found the right upon, should not be materially varied to the prejudice of other owners. He is not bound to use the water in precisely the same manner, or apply it in the same way; and in this country, as in England, a change in the mode and objects of use is allowed, the only restrictions being, that the alterations made shall not be injurious to those whose interests are involved.—Cotrel v. Luttrel, 4 Co. R. 87, a; Saunders v. Newman, 1 B. & A. 258; Hall v. Swift, 6 Scott 167; Darlington v. Painter, 7 Barr 473; Blanchard v. Báker, 8 Green. 253; Johnson v. Rand, 6 N. H. 22.

For the error we have noticed, the judgment must be reversed, and the cause remanded.

LANIER *vs.* DRIVER.

1. In a case of interpleader, after the discharge of the complainant, the testimony having been published by consent without prejudice, it is discretionary with the Chancellor to permit an amendment of one of the answers.
2. A deed of trust held not to be fraudulent on its face, which was made without the knowledge of the preferred creditor, whose debt was past due, and reserved to the grantor the use of the property until the creditor ordered a sale.
3. The actual assent of a beneficiary is not required to a deed of trust which is clearly for his benefit.
4. Where a debtor executes two deeds of trust at different times, the beneficiaries in the second deed may enforce the execution of the trust after the law day of their deed, and therefore cannot complain of the negligence of the others after that time.

ERROR to the Chancery Court of Sumter.

Heard before the Hon. J. W. LESESNE.

The record shows the following facts: One Henry F. Scruggs, being largely indebted to sundry persons, among whom was Eli M. Driver, his brother-in-law, executed a deed of trust for their benefit, on the 29th of June, 1839, to one James B. Tartt, as trustee. This deed conveys to the trustee the grantor's undivided interest in a certain family of negroes, then in his possession, consisting of a woman named Mary and her three children, Maria, Margaret and Lucinda; also seven other negroes, a carriage, buggy, horse, and some household and kitchen furniture; the trustee is authorized to sell, either at public or private sale, on the demand of any of the beneficiaries; and it is stipulated that the grantor shall remain in possession of the property until the trustee shall deem it necessary to take possession for the purpose of executing the trust. Driver's debt, which was secured by this deed, amounted to $1,000, due, by note, about the first of January, 1839.

On the 18th of November, 1841, said Scruggs executed another deed of trust, conveying the same property, except a boy named Wash, to William M. Inge and Robert H. Smith, in trust to secure a debt which he owed to the estate of Wells Thompson, deceased, amounting to about $3,500, payable by instalments on the 8th day of November, 1842, 1843 and 1844. This deed contains the same stipulations as the first, as to the rights of the trustees and, the retention of possession by the grantor.

In the year 1846, Smith, the trustee in the second deed, was about to sell the property conveyed by it, when he was notified by M. C. Houston, as the agent of said Driver, that Driver's debt was still unpaid, and that he would insist upon its payment before the debt to Thompson's estate was satisfied. The administrator of Thompson's estate, Sampson Lanier, objected to this; and it was thereupon agreed between the said parties, each acting through his agent, that Smith should proceed to sell the property, and retain in his hands an amount sufficient to satisfy Driver's claim, and that the parties should take steps to test the validity and *bona fides* of that claim. Smith accordingly sold the property, and retained in his hands the sum of $1,541 87, being the amount claimed by Driver for principal and interest due on his debt. He then filed a bill of interpleader against Lanier, as administrator of Thompson, and

Driver, asking that they might be made to litigate their right to the fund in hands.

Driver filed his answer on oath on the 4th of December, 1846, insisting, that his debt and the deed of trust made to secure it are valid and *bona fide*; that his debt is yet unpaid, to the whole extent of the funds in Smith's hands; that he did not agree that Smith should hold the fund subject to future litigation, but that Smith should pay it to him absolutely. He sets up the deed of trust made for his benefit, and insists that it is entitled to preference, by priority of time and right, to the other deed, under which Smith obtained the money; and he denies all fraud and unfairness in relation to his debt and the deed made to secure it.

On the 25th of September, 1846, Lanier filed his answer on oath, as administrator of Thompson, setting out the agreement between the parties, as alleged in the bill, in reference to the money retained by Smith; denying the *bona fides* of Driver's claim, and alleging that, if it ever was due, it has been paid by Scruggs. He also insists, that the beneficiaries in the deed under which Driver claimed had permitted the grantor to sell and destroy by use much of the property conveyed by it, and to convert the same to his own use; that the first conveyed property, not embraced in the second, sufficient, or nearly so, to satisfy Driver's claim, and that he should be compelled to appropriate this property to the payment of his debt, before he can resort to the property included in the second deed; that the first deed had been kept open, and the trust in favor of Driver unenforced, for six years, fer the fraudulent purpose of hindering, delaying and defrauding the creditors of Scruggs.

At the June term, 1847, a decree was rendered, discharging said complainant upon his paying the fund in his hands into court, and ordering said Lanier and Driver to proceed to establish their respective claims to it. At the June term, 1848, an order was made for the publication of testimony by consent without prejudice; and some of the depositions having been retaken, a similar order was made at the February term, 1849. At the February term, 1851, Driver moved for leave to amend his answer, so as to make it conform to the allegations of the bill respecting the agreement under which Smith sold the property and retained the money; and in support of his application, he filed the affidavits of himself and his solicitors, stating that

he had answered upon information and belief only as to that matter, and had either misunderstood the facts or been misinformed. This application was contested, but the amendment was allowed.

The Chancellor decreed in favor of Driver's right to the fund in court, and ordered a reference to the master, to ascertain and report the amount of his claim, and whether the first deed embraced any property to which he might resort for payment before going upon the fund in court. The master reported, that there was no other property to which Driver could resort; that the boy Wash, conveyed by the first deed, had been sold by said Scruggs, without the knowledge or consent of Driver, and the proceeds applied to the payment of other debts secured by the deed; that there had been a fair division of the slaves in which Scruggs had an undivided interest, upon which Mary fell to his share, and Lucinda to another; and that Mary had been sold. There were exceptions to this report, but the same was confirmed.

The writ of error is sued out by Lanier, but the errors assigned do not anywhere appear on the record.

Turner Reavis, for plaintiff in error:

I. The amendment of Driver's answer was improperly allowed:

1. Because a chancellor only has the discretion to allow an amendment *before* the hearing of the cause. He cannot allow it *after* the hearing.—Clay's Dig. 351, § 37; Evans v. Bolling, 5 Ala. 550; Bryant v. Peters, 3 Ala. R. 171; McKinley v. Irvine, 13 Ala. R. 707; Goodwin v. McGehee, 15 Ala. Rep. 249–50–51.

2. Because the amendment was inconsistent with the answer. Rogers v. Rogers, 1 Paige 424; Verplank v. Merchants' Ins. Co., 1 Edw. 46.

3. Because it made a new case.—Rugely v. Robinson, 10 Ala. 746; McKinley v. Irvine, 13 Ala. 707; Lloyd v. Brewster, 4 Paige 438; Pratt v. Bacon, 10 Pick. 123; Walden v. Bodley, 14 Peters 156.

4. Because the application to amend was not made until after the lapse of several years after the answer was filed, nor until long after proof had been taken, showing the answer to be false,

on the very point in respect to which the amendment was allowed.—Curling v. Townsend, 19 Ves. 628; Goodwin v. McGehee, 15 Ala. 251.

II. The deed of trust for the security of Driver's debt, was void, as against Lanier:

1. Because Driver did not assent to it.—See the cases cited in 1 Reavis' Dig., p. 80, § 45. Even if no act was required to be done by Driver, so as to render his express assent necessary, still, his assent cannot be presumed, because it is proved that he did not know of the existence of the deed until after the execution of the deed for the benefit of Lanier.—8 Cond. Eng. Ch. R. 97.

2. Because it was made to hinder and delay the other creditors of the grantor. This is shown by these facts: It was made without the knowledge or request of Driver; the debts secured by it were all due at the time it was made; it conveyed property consumable in its use; it fixes no certain law day, yet reserves the use of the property conveyed to the grantor; the grantor remained in possession of the property —— years, treating it all the while as his own, selling a valuable portion of it, and using some of the rest in such a manner that it was either destroyed or rendered valueless; and, while in possession, he declared to Lanier's attorney that Driver's debt was not a subsisting claim on the property. Nothing can be stronger evidence of an intent to hinder and delay creditors, than for a debtor to make a conveyance of his property, for the security of a particular creditor, without the knowledge or consent of that creditor, and reserve the use of the property until that creditor orders a sale.—Somerville v. Horton, 4 Yerg. 541; Charlton v. Lay, 5 Humph. 496; Farmers' Bank v. Douglass, 11 Smedes & Marsh. 469; Richmond v. Crudup, Meigs' R. 581; Cram v. Mitchell, 1 Sanf. Ch. R. 251; Swift v. Thompson, 9 Conn. R. 63; Ravisies v. Alston, 5 Ala. 302; Wiswall v. Ticknor, 6 Ala. 184-5; Smith v. Leavitts, 10 Ala. R. 93; Simerson v. Branch Bank, 12 Ala. 213; Dearing v. Watkins, 16 Ala. 25; Johnson v. Thweatt, 18 Ala. 741.

III. If Driver assented to the deed for his benefit, or knew of its existence, by permitting the grantor to remain in possession of the property for so long a time, and to use it as his own, he enabled the grantor to commit a fraud upon Lanier. He

must, therefore, be the sufferer for the consequences.—Somes v. Brewer, 2 Pick. 202; Lupin v. Marie, 2 Paige 172.

IV. There was property conveyed in the deed to Driver, which was not conveyed in the deed to Lanier. Driver, therefore, should have been compelled to resort to that property for the payment of his debt, before being allowed to participate in the fund derived from the sale under Lanier's deed.—Nelson v. Dunn, 15 Ala. 502; Baine v. Williams, 11 Smds. & Marsh. 113; Clowes v. Dickerson, 5 Johns. Ch. R. 235; 8 Ves. 388; 9 Ves. 210.

Bliss & Baldwin, *contra*:

I. There was no error in granting Driver leave to amend his answer, under the circumstances, and in the particular matter specified; because:

1. The amendment was not in a substantive and material point; it did not touch the right of Lanier to the money, nor the rights of the parties as against each other; it only related to the *status* in which, or condition on which, the money was left in Smith's hands. Each of these parties derived his right to it, if any he has, from his own deed; and the *quo modo* by which he comes at it, or is let into the enjoyment of the fund, is unimportant.

2. Parties who are put to interplead do not fall within the ordinary rules as defendants, as to amendments; they sustain to each other a sort of double relation, both as complainants and defendants.

3. It does not lie with Lanier to complain that Driver is permitted to amend, thereby making his answer conform, as to the point covered by the amendment, with the answer of Lanier himself.

4. The granting of the amendment was a matter of discretion with the Chancellor, and not revisable on error. The cases cited by the plaintiff were all cases where the leave to amend was denied, and it was held to be no error; but it does not necessarily follow, that it would have been error to grant it. Each case must be decided upon its own circumstances, and in the exercise of a sound discretion.—1 Dan. Ch. Pr. 480 to 482; 2 *ib.* 911; 4 Dess. 330, 480; 2 Barb. Ch. R. 148, 395, 637; 5 Geo. 390; 14 New Hamp. 175.

5. The facts in this case well warranted the leave to amend. Driver was a non-resident,—answered upon information as to the matters transacted at Livingston, was misinformed or misunderstood, and fell into error on an unimportant point; and as soon as he discovered his mistake, he applied for leave to amend it, and leave was granted. The amendment was not inconsistent with, and did not vary, the main matter in issue between the parties.

6. The statute does not inhibit the amendment. It merely provides, by way of exception or proviso, that the right before existing shall not be taken away under the enacting clause of the statute.

7. The publication of the testimoy was by consent, and without prejudice; so that no argument can be raised from that fact against the right to amend.

II. The deed is not void. Being for Driver's benefit, his assent will be presumed.—Mauldin v. Armstead, 14 Ala. 702; Lockwoood v. Nelson, 16 Ala. 294. It did not postpone Driver's debt; he might immediately coerce a sale.—Brock v. Headen, 13 Ala. 370. The deed is not fraudulent on its face, and was not fraudulent in fact.—7 Ala. 235, 690, 765, 873; 10 *ib.* 571; 11 *ib.* 689; 12 *ib.* 673; 16 *ib.* 560; 20 *ib.* 179.

III. There was no other property to which Driver should be turned. The boy Wash was sold, and applied to the debts in the first deed, which had precedence over Lanier's, and so went to his benefit. In Mary and Lucinda, the grantor had but one fourth interest at the making of the deed; in a subsequent informal division, Mary fell to Scruggs, and Lucinda to a brother of his. The value of the two was equal; Mary was sold by Smith, and the trust fund received her entire value. Driver was in no such default about the few articles of inconsiderable value which were lost, that he should be visited with the loss. But if he were charged with their loss, there would not be enough to pay the balance of his debt in full, after deducting the trustee's commissions.

PHELAN, J.—Smith filed his bill of interpleader against Lanier, administrator of Thompson, and Driver. The bill sets forth that H. F. Scruggs made two deeds in trust; one to Tartt, trustee, in 1839, to secure sundry creditors, and among

the rest Driver, in a note for something over $1,000; and the other in 1841, to secure Thompson's administrators, to whom Lanier succeeded. Both deeds embraced the same property; but the deed of 1839 some property not embraced in the deed of 1841, in which Smith, the complainant in the bill of interpleader, was trustee. Smith, the trustee in the second deed, was about to sell the property to pay the debts secured by it, when, as he alleges, he was notified by the agent of Driver that the property was first liable to pay the debts secured by the deed of 1839, and that Driver would insist upon his right to have it so appropriated. He then further alleges, that, in order to have a sale of the property, an agreement was entered into between himself, as agent of Lanier, and one Houston, as the agent of Driver, that the property should be sold, and that the sum of $1,541 87, the amount of Driver's claim, should be retained by Smith, to be delivered up to him who should be able to show the best right to it.

All the material allegations of the bill are admitted by both Lanier and Driver, with this exception on the part of Driver: he denies any such agreement, and insists in his answer that the amount of his claim was to be retained for him by Smith absolutely, and not subject to any future contestation as to his right to the money.

The proof on this point abundantly sustains the allegation of the bill. The Chancellor decreed, that Smith should pay the money retained by him into court, and that the parties should proceed to contest between themselves the right to it. After the publication of the testimony, but by consent, and without prejudice, and the argument of the cause, Driver filed a petition to amend his answer, stating that he had denied the agreement as alleged upon information only, and that he had acted either under incorrect information, or a misapprehension of his own, and was now satisfied that the agreement, as to the terms on which the sale was to proceed, and the amount of his claim retained, were truly stated in the bill of Smith. The truth of the facts stated in this petition is strongly supported by the affidavits of his solicitors, and especially by the one who drew his answer. The leave to amend, though strenuously opposed, was allowed by the Chancellor.

We think this was a matter purely within the sound discre-

tion of the Chancellor, and therefore not revisable on appeal. But, if it were essential to go further, we should be inclined to think that the discretion was properly exercised. The answers to a bill of interpleader, when the complainant is discharged, are looked to for the purpose of ascertaining the title respectively set up by the defendants to the bill, now become contestants to the fund delivered into court. It is questionable whether the ordinary rules which govern answers, and amending answers, properly apply in such a case. The answers become rather the bills of complaint of the respective parties.—3 Dan. Ch. Pr. 1765; 1 Smith Ch. Pr. 472; 2 Story's Eq. § 822.

Now, what is the title respectively set up to this fund by Lanier and Driver? Lanier relies on the deed of 1841; Driver, on the deed of 1839. It is the deed in trust of 1839, that gives Driver the right to this money, as against Lanier, if he is entitled at all, and not the allegation which he makes, denying the agreement set out by Smith, and averring that the money was to be paid to him absolutely, and without contestation. If that deed be good, his answer makes a case which would entitle him to a decree for the money, whether the allegation about the agreement to submit to a contestation was true or false. And if his deed be not good, and the deed in favor of Lanier be good, Lanier, in like manner, would be entitled to the money, irrespective of the nature of that agreement, or the truth or falsehood of Driver's allegation in respect to it.

This leads us to consider the question concerning the validity of the deed of 1839, and the right of Driver to be paid out of the proceeds of the sale of the property embraced in it.

We can find nothing fraudulent on the face of that deed. Many cases in our reports sustain every material feature in it. —See authorities cited in brief of defendant in error; also Rankin v. Lodor, 21 Ala. 380.

Neither did it require the actual assent of Driver to make it operative in his favor. It is a deed of that character in which the assent of the beneficiaries will be presumed, because it is clearly for their benefit.—See same authorities, and 21 Ala. *supra*.

The sale of the slave Wash, by Scruggs, the grantor, it is shown, was made by him without the knowledge or consent of Driver, who lived at a distance; and therefore, whether the pro-

ceeds of that sale went in payment of other debts secured by the deed, and was made with the consent of certain of the beneficiaries, and so lawfully made, as is insisted, need not be considered, so far as he is concerned. There is nothing shown, which would go to charge him with so much of the trust fund wasted or converted, with his connivance or through his neglect. The law day in the second deed, it may be observed, expired in 1842; and if the beneficiaries in the first deed were tardy in enforcing their trust, those in the second had it in their power, after that time, to compel them. This is an answer to the objection that Driver was negligent in closing his trust.

Scruggs conveys an undivided interest, which was one fourth part, in Mary and her children. The proof shows that, after the date of the deed, and before the sale in 1846, H. F. Scruggs and his brothers had a division of the slaves, by which Mary fell to H. F. Scruggs as his share, and she was sold. If this division was fair and equal, and such is the proof, the demands were satisfied by the sale of Scruggs' slave, and the beneficiaries would have no just claim upon Lucinda.

These observations, it is believed, cover all the assignments of error which have been insisted on in the argument; and it will be seen that we find no error in the decree of the Chancellor.

Let the decree below be affirmed, at the costs of the plaintiff in error.

SHACKELFORD *vs.* KING.

1. In the matter of the settlement of an insolvent estate, an issue having been formed between the executor and creditors, various irregular pleadings were aftewards allowed by the court, and the executor then sued out a writ of error to reverse the judgment rendered against him: *Held*, that the case should be considered as if the parties had been held to the issue which they had first formed, and that the subsequent pleadings and rulings of the court should be disregarded.

2. Prior to the passage of the act of 1843, two joint executors filed "a statement of the condition of the estate" or their testator, showing an excess of debts over personal assets, which was received by the court, and ordered to be recorded, the order reciting that the estate appeared to be insolvent; and the real estate was afterwards sold, as in cases of insolvent estates: *Held*, that this was sufficient to give the court jurisdiction of the estate as insolvent, and that it should be so settled.
3. Since the passage of the act of February 11, 1850, if the settlement of an insolvent estate is transferred from the Probate to the Circuit Court, on account of the incompetency of the probate judge to preside in the case, the latter court should not appoint commissioners to settle the estate, but should proceed with the case as the former would have done.
4. When an executor becomes surety on a note given for property purchased at a sale made by himself and his co-executor, and, the estate becoming insolvent, he is cited by his co-executor, on behalf of the creditors of the estate, to make final settlement and account for the note, he cannot protect himself by a plea of the statute of limitations of six years.
5. As to his raising the objection that no sufficient notice of the settlement had been given.
6. On the trial of an issue between the executor and the creditors of an insolvent estate, a note may be given in evidence without any proof of its execution, if its execution is not denied by the plea of *non est factum*.

ERROR to the Circuit Court of Shelby.

Tried before the Hon. JOHN D. PHELAN.

THIS was a proceeding on the part of Edmund King, one of the defendants in error, on behalf of himself and others as creditors of the estate of Job Mason, deceased, against Jack Shackelford, the plaintiff in error. Said King and Shackelford were the executors of the last will and testament of Mason, letters testamentary having been granted to them, in 1827, by the Orphans' Court of Shelby. They seem to have acted conjointly, until 1829, when Shackelford removed to Lawrence County; and after that time King seems to have carried on the business of the estate alone. They jointly rendered an inventory of the estate, obtained orders to sell the personal property, and made the sales; on the 16th of April, 1828, they filed a "statement of the condition of the estate," showing assets to the amount of $4169 43, and debts presented against the estate amounting to $4816 86; these assets, however, are shown to consist of the proceeds of sales of personal property unsold appraised at $1604 37. This report was received by the court, and ordered to be recorded; and

on it was predicated an order to sell the real estate, which was afterwards sold, the proceeds amounting to $642 25.

At one of the sales by the executors, it seems that one Robert J. Farrell purchased property to the amount of $515, and executed his note for the payment of the purchase money, with Jack Shackelford, one of the executors, as his surety. The note is as follows:

"$515. On or before the first day of January next, we or either of us promise to pay Edmund King and Jack Shackelford, executors of Job Mason, deceased, five hundred and fifteen dollars, for value received, February 9th, 1828.

ROBERT J. FARRELL.
JACK SHACKELFORD."

The administration of the assets of the estate seems to have been mostly under the conduct and control of King, particularly after Shackelford's removal from the county in 1829. After all, or nearly all, of the other assets had been administered, King attempted to collect the above described note on Farrell. He obtained a judgment at law against Farrell, on which an execution was issued, and returned "no property found." He then instituted a suit at law against Shackelford, as surety on the note, but failed to obtain judgment. Afterwards proceedings in chancery were instituted, to effect the collection of the note, but without success.—See the report of the case (King v. Shackelford) in 6 Ala. 423.

Various orders were made in the matter of the estate, from 1829 to 1833; and at the March term, 1833, the following order was made: "The judge of the County ——— having, previous to his appointment to said office, been employed as counsel by persons having claims against the estate of Job Mason, deceased, it is ordered that the said cause be transferred to the Circuit Court of Shelby."

On the 12th of May, 1846, King, as one of the creditors of the estate of Mason, and as one of the executors, filed his petition in the Orphans' Court of Shelby, praying that said Shackelford, as one of the executors, be called to settle his accounts, and that he be charged with the amount of Farrell's note and interest. To this petition Shackelford filed his answer on the 4th of December, 1846, denying any

assets in his hands and all liability whatever; and on the 13th of May, 1848, another answer seems to have been filed by him, to nearly the same effect.

At the December term, 1846, for the purpose of defeating King's petition, Shackelford's counsel appeared in court, and insisted that said court, in consequence of the said order of transfer, made at the March term, 1833, had no jurisdiction to proceed further in the cause; and he moved to dismiss the said petition, insisting that the Circuit Court only had jurisdiction of the cause. The court sustained the motion, and dismissed the petition; but its decision was afterwards reversed on error by the Supreme Court.—See King v. Shackelford, 13 Ala. 436.

The cause having been remanded for further proceedings, the first day of June, 1848, was appointed for its hearing.—On that day the parties appeared; and King, by his counsel, filed a replication to Shackelford's answer, insisting that he was liable to be charged with the amount of said note. To this replication, Shackelford, by his attorney, demurred, and the demurrer was sustained; and, as the record states, "the creditors then take issue on the answer." After this, "Shackelford demurs to the petition, to which the petitioners object; objection overruled, and demurrer sustained by the court. Filed in office, June 1, 1848." After this, but at the same term, a plea of the statute of limitations is put in; to which a demurrer is interposed, and sustained by the court. The next paper in the record is an account current, filed by said King, on the first of June, 1848, "showing his management of the estate from December, 1840, up to this day."

The record next sets out a notice to Shackelford's attorney of record, that on the second Monday in March, 1849, said King will move the Orphans' Court "for a final judgment, *nunc pro tunc*, in settlement of the matter of plaintiff's petition for himself and the creditors of the estate of Job Mason, deceased, against the said defendant, said King being a creditor of said estate"; and "that all steps will then be taken for a final determination of said matter." This notice is dated February 25th, 1849, and was returned executed.

On the 12th of March, 1849, the following judgment *nunc pro tunc*, as of the first of June, 1848, is entered: "Came

the parties by their attorneys, and Jack Shackelford filed his answer, denying any assets in his hands as executor of Job Mason, deceased; to which answer Edmund King, as a creditor, replied; to which replication Shackelford, by attorney, demurred; which demurrer is sustained by the court, and it is here ordered that the same be sustained.—Said Shackelford then offered to demur to King's petition, asking for a settlement of testator's estate; to which King objected, but which was permitted by the court; and the same being heard and understood by the court, it is ordered, adjudged and decreed, that said demurrer to said petition be sustained by the court, and that said Shackelford go hence, and recover of said King his costs about his suit in this behalf expended, for which let execution issue; and this judgment is rendered as of said 1st June, 1848. Then King, as executor, filed his accounts and vouchers, which are received by the court," &c.

On the second Monday in June, 1850, on motion of King's attorney, "the case is taken up; and the judge of the court having been of counsel in the case, for plaintiff, before his election to this office, it is ordered by the court, that this cause be transferred to the Circuit Court of Shelby"; that a certified copy of all the orders made in the cause be sent up to the Circuit Court; and that Shackelford, or his attorneys, have notice of the order. A copy of this order was executed on Shackelford's attorney, on the 14th of June, 1850.

On the trial in the Circuit Court, as appears from the bill of exceptions, "the defendant objected that the court could not proceed with the cause at the present term, for the following reasons: 1st, that it does not appear from the record that any sufficient notice of this settlement has been given, by publication, or otherwise; 2d, that it does not appear that any citation has issued to Shackelford, to appear and settle his accounts; 3d, that the court is bound by law to appoint commissioners to settle the estate; and, 4th, that the court has no jurisdiction of the cause: and in support of his several objections, he read the record of the proceedings from the Orphans' Court in this cause, and the papers in the cause; and the court overruled the said several objections,

and proceeded with the cause; to which Shackelford excepted.

"The hearing of the cause then proceeded; and King introduced, in support of his claim against the estate, all the decrees in the cause heretofore made; to which the defendant objected, on the ground that said proceedings appeared on their face to be *ex parte*, without lawful notice to the parties concerned, and that the court had no jurisdiction to make said several orders separately. The court overruled the objection, and the defendant excepted.

"The plaintiff then offered, in further support of his claim, a note made to him, purporting to have been made by Job Mason in his life time, without any proof of its execution aside from the production of the paper. To the sufficiency of this proof the defendant objected; the court admitted the note in evidence, and defendant excepted. The plaintiff then offered in evidence the said note of Farrell's, on which said Shackelford was surety, without any proof of its execution aside from the production of the paper. The defendant objected to the admission of the evidence, on the ground that the proof was not sufficient to authorize the reading of the note in evidence; but the court overruled the objection, the note was read, and defendant excepted.

"The court then, on motion of the plaintiff, King, suffered him to make affidavit of the justness and validity of his claim against Mason's estate, and that the same was unpaid, except as shown in the petition and record. The defendant then claimed three months' time, in which to contest this claim; but the court required him to contest immediately, and defendant excepted. The defendant then contended, that the estate had never been declared insolvent by the court, and that the court had no power now to proceed to settle it as an insolvent estate; and he read, in support of his objection, all the papers and orders of the Orphans' Court in this cause. The court overruled the objections, and proceeded to decree as in cases of insolvent estates; to which defendant excepted. The defendant then objected, that there was no sufficient proof of any claim against the estate, and that the creditors had not proved their claims, and that none of the claims against the estate had ever been

legally proven; these objections were severally overruled by the court, and defendant excepted. The defendant then proved by Edmund King, while he was on the stand as his own witness, that he had never presented the note of Job Mason to defendant, as a co-executor of said estate, for payment, and defendant moved the rejection of said claim; but the court overruled the objection, and defendant excepted. The court then proceeded to render the decree found in the record; to which defendant objected," &c. This decree condemns Shackelford to pay the amount of said note, and orders the proceeds to be divided *pro rata* among the creditors; and a judgment is entered in favor of each creditor, for his specific amount.

Tho errors assigned are as follows:

1. The court erred, in settling the estate as an estate declared insolvent;

2. The court erred, in assuming jurisdiction of the case, after it had been finally disposed of in the Orphans' Court, by its decree entered *nunc pro tunc* on the 12th of March, 1849;

3. The court erred, in refusing to appoint commissioners to settle the estate;

4. The circuit judge had no jurisdiction to settle the case in the manner in which he has settled it;

5. The court erred, in the decree rendered in the cause, and in awarding execution;

6. The court erred, in sustaining a demurrer to the plea of the statute of limitations to King's petition;

7. The court erred, as appears from the various matters of the bill of exceptions.

Rice & Morgan, for plaintiff in error:

The Circuit Court should have sustained the objection to its jurisdiction: as against Shackelford, who was the defendant sought to be charged, that court had no jurisdiction. The order of the Orphans' Court *nunc pro tunc*, at the March term, 1849, was a final discharge as to Shackelford; it was a judgment "that said Shackelford go hence, and recover of said King his costs." This put an end to the power of the court over him. Hale v. Walker, 16 Ala. 26.

Immediately following this final judgment, is an *ex parte* entry, reciting that the case was "pending" in said court, and that the judge of said court had been of counsel for King before his election, and ordering the transfer of the cause to the Circuit Court.—King v. Shackelford, 13 Ala. 436. This order is void, because, first, the case had previously been finally decided; secondly, because it shows on its face that Shackelford had no notice of such "proceeding" (McCurry v. Hooper, 12 Ala.); thirdly, because the act of 1850 (Pamph. Acts 1850, p. 36, § 40) does not authorize such transfer in such cases: that section enacts, "that no judge of probate shall act upon the determination of any cause or *proceeding*, or take jurisdiction of any matter in which he is interested, * * * or in which he shall have been of counsel, * * * unless by the consent of the parties concerned; but in such cases, (that is, where the judge has been of counsel, and the parties will not consent to his taking jurisdiction,) the cause or proceeding shall be commenced, or transferred, as the case may be, to the Circuit Court." Now an order transferring a cause to another court, is obviously a "proceeding;" and the statute forbids such transfer without notice to "the parties concerned." Else why are the words, "unless by consent of the parties concerned?" How could they consent, without first having notice. There was no law, prior to the act of 1850, authorizing a probate judge to transfer a cause to the Circuit Court; and the act of 1850 does not authorize the transfer, "unless by consent of the parties concerned." Such cases as may be transferred under the act of 1850, must be transferred by "consent of the parties concerned," or by an order of the Circuit Court itself, upon proper application and notice.

But when "such cases" are transferred properly, the Circuit Court can only take jurisdiction of them, and proceed therein, as the Probate Court might have done.—Acts of 1850, p. 36, § 40. Clay's Dig. p. 305, § 46, shows how the Probate Court should have proceeded. There is nothing in the record, which could authorize either court to settle this estate as an insolvent estate. The executors have never "represented," nor "reported," the estate to be insolvent; and it is certain that a record, or report, or representation, is inadmissible and insufficient to prove any fact which can only be inferred from it by argument.

McCravey v. Remson, 19 Ala. 430. The report or representation of insolvency cannot be even inferred by argument from this record, when the statutes in force prior to 1843 are regarded. The statement of the condition of the estate, which is relied on as a report of insolvency, only relates to personal estate; it speaks of a portion of that personal estate, appraised at $1,604 37, as not sold; it does not say there is no real estate; nor does it say that the personal estate is not worth, and will not bring, a much larger sum than $1,604 37; it does not aver that the claims against the estate are believed by them to be *bona fide* or subsisting, but speaks of them as "demands presented against said estate, $4,067 36;" it does not aver or state that the estate is insolvent.—Aikin's Digest (2nd ed.) 151 § 2; Clarke v. West, 5 Ala. 126; Lambeth v. Garber, 6 Ala. 870.

Again; the record shows that the estate owned lands, which the executors had power to sell under the will; that these lands were not included in the aforesaid statement of the condition of the estate; that this statement was not made or intended as a report of insolvency, but merely to get an order to sell the real estate, on the ground that the claims presented exceeded nominally the personalty sold. This was not a good ground for an order to sell the lands under the act of 1822; but the object and intent was, to get such an order of sale. The statement is dated *April* 16, 1828; while the bond of the executors is dated *June* 2, 1828, and shows that they had obtained an order to sell the lands. The value of the lands owned by the estate is not hinted at.

But a mere report of insolvency, without more, could not authorize the Circuit Court to treat the estate as insolvent, and settle it as such: the Orphans' Court must have ascertained the fact of insolvency, after a report of insolvency was filed, before the Circuit Court could have settled the estate as insolvent.—Hollinger v. Holly, 8 Ala. 456.

Even if the estate had been duly reported and declared insolvent, prior to 1843, the court erred in allowing King "to make affidavit of the justice and validity of his claim against Mason's estate, and that the same was unpaid," as is expressly decided in Askew v. Weissinger, 6 Ala. 907; see, also, Martin v. Baldwin, 7 Ala. 923.

The case between Shackelford and King, in 13 Ala., shows that King proceeds only as a creditor, and is only entitled to share in the demand. On the petition of King as creditor, the court had no power to decree in favor of others.

B. T. Pope, *contra :*

The first assignment of error is not well taken, because the estate was declared insolvent on the 16th of April, 1828, on the joint report of the two executors. The report is signed by both, and sworn to by King. These proceedings, and the order thereon, are regular; and they were had at the instance of the executors, who cannot complain. Even if Shackelford had not participated, he would have been bound, as to creditors, by the acts of his co-executor.—Williams and Joy, ex'rs, v. Sims, 8 Porter 579; Crothers v. Heirs of Ross, 17 Ala. 816; Watts v. Gayle & Bower, 20 Ala. 825. The statute in force in 1828 did not require the executor to "report the estate insolvent" in terms, but merely "to exhibit to the court a just and true account," &c.—Aikin's Dig. 151 § 2.

The second and third assignments are not good, because there is no law requiring the appointment of commissioners. The statute of 1850 requires that the Circuit Court "shall take jurisdiction of, and proceed therein, as the Probate Court might have done." The presiding judge is, for this purpose, the court.—Clarke v. West, 5 Ala. 126.

The fourth assignment cannot be sustained; or, at any rate, Shackelford cannot complain, if all the other parties are satisfied. The record shows that he frequently appeared, in person and by attorney, and made several motions.

As to the fifth assignment: The decree is regular in adjudging that the creditors recover of Shackelford the aggregate amount found to be due from him to the estate, to be distributed *pro rata* to each creditor. The awarding of execution was mere surplusage; and even this was not irregular.

As to the sixth assignment: Shackelford cannot be heard to complain that notice of the settlement was not given, or that he was not cited; after he is once in court, he is presumed to be cognizant of all subsequent proceedings.—5 Ala. 117; 20 *ib.* 825. Nor can he complain of any irregularity as against the creditors. As the heirs and creditors do not complain, it is im-

material to Shackelford how the fund in his hands is distributed. None of "the parties concerned" are complaining.

It was not necessary to prove the execution of Shackelford's note, because there was no plea of *non est factum*; nor was there any denial of indebtedness on this note. As the record shows that Shackelford had notice of all the claims against the estate, it cannot be contended that it was necessary for King to present his claim to Shackelford.—Acre v. Ross, 3 Stew. 288.

GIBBONS, J.—The merits of the petition filed by the defendant, King, praying that the plaintiff in error be cited to a final settlement as one of the executors of Job Mason, deceased, were settled when this case was in this court on a former occasion.—*Vide* King v. Shackelford, 13 Ala. 436. The judgment of the court below, then under revision, was one dismissing the petition of King, on the ground that, in 1833. an order was made by the Orphans' or County Court of Shelby, removing the cause to the Circuit Court of said county, because the then presiding judge had been of counsel in the case. This order, according to the decision of the Orphans' Court, deprived the Orphans' Court of all jurisdiction in the matter. But the Supreme Court decided this to be a void order, and that the jurisdiction of the Orphans' Court was unaffected by it. In making the decision, however, the court express their opinion as to the merits of the petition, and decide that it is well filed. This relieves us from any further discussion of the merits of this petition.

Before proceeding to the consideration of the points presented by the present record on the assignment of errors, we deem it necessary to remark, that much embarrassment seems to have arisen in the progress of the cause from an apparent disregard of legal principles, as shown by some of the decisions upon the subject of pleading in the court below. In the first place, we deem it quite absurd to apply to the pleadings in the Orphans' Court either the technical rules or terms of the common law pleadings; and in the second place, in their application as shown in the present record, there would seem to be an entire misapprehension of their meaning. To show this, it is only necessary to refer, for one moment, to the history of what, in a suit at common law, would be called pleading, but which in the present

proceedings is certainly anomalous. To the plaintiff's petition, regularly filed, setting out fully the ground of his claim against the defendant, and calling upon him to answer and make final settlement, the defendant comes in and answers, denying all assets in his hands and his liability to account to the plaintiff, or to the creditors, for anything in his hands or for anything whatever. At this point there is no difficulty, as the parties are fairly at issue, and it rests for the court to decide the matter of contest between them. But neither party seems satisfied with this state of the pleadings, and the plaintiff files what he calls a replication to the defendant's answer, in which he avers simply what he has already averred in his first petition, viz., that the defendant is liable to account for the amount of the Farrell note, as security thereon, he being co-executor of the last will and testament of Mason, deceased. To this replication the defendant demurs, after having, by his previous answer to the petition, admitted the legal sufficiency of the same facts therein alleged, and forming therein the gist of the whole petition; and (strange to say) the court, with the opinion of the Supreme Court expressed directly upon this point before it to the contrary, sustains the demurrer to the replication. The plaintiff then takes issue upon the defendant's answer; and we should naturally suppose that the trial would now proceed, as the parties are once more at issue, and precisely where they were when the defendant filed his answer to the petition; but no! the defendant now demurs to the plaintiff's petition, and (strange to say) the court sustains the demurrer, thus overruling, for the second time, the decision of the Supreme Court expressed in that very cause, and with the decision before it. After all this, when, according to the ordinary understanding of the terms of pleading, there was no cause in court, the defendant pleads the statute of limitations, to which a demurrer is filed, and the demurrer sustained by the court.

Of this jumble of legal verbiage—this misapplication of legal technicalities—we can make nothing. In the discussion of the various points presented by the record, we have resolved to do what the Orphans' Court should have done, viz., hold the parties to the issues which they have made, and disregard everything in the shape of pleading that has arisen subsequent to the formation of such issues. After the petition was filed, and the

answer thereto, the parties were at issue, and the Orphans' Court should have disregarded and stricken out everthing in the shapo of pleading, arising after that time, that is shown in the present record, as soon as it arose, until the answer of the defendant had been withdrawn. The duty of the Orphans' Court was, to inquire into the facts alleged in the petition; and even whether the answer of the defendant was formally filed or not, could make but little difference, except, that by so filing his answer, he admitted the legal sufficiency of the petition, and while such answer remained he could not be heard by way of demurrer.

The first assignment of error is, that the court erred in settling the estate as one declared insolvent.

This assignment of error, in our opinion, is not well taken.—It appears, by the record, that the executors, both King and Shackelford, as long ago as the 16th of April, 1828, made a report of the assets and debts of the estate, by which it appears that the assets were $4169 48, and the debts $4816 86; and on the same day the court accepts the report, in which, says the court, "it appears that the estate is insolvent," and orders that the report be recorded. At the same time it proceeds, as in an insolvent estate, to take the legal steps for the sale of the real estate of the decedent. This, according to the law as it then stood, was all that was necessary to give the court jurisdiction of an estate as insolvent; and having once obtained jurisdiction, it would retain it until it was finally settled, or at least until all the debts were paid and the estate shown to be solvent.

But it is insisted, in the second assignment of error, that the court erred in taking jurisdiction of the cause, after it had been finally disposed of by the entry *nunc pro tunc*, of the 12th of March, 1849, of the judgment upon the demurrer to the petition, as of the first of June, 1848; and as this demurrer put an end to the whole proceeding, therefore, after this judgment was formally entered *nunc pro tunc*, there was no longer any case in court. The remarks which we have already made as to the pleadings in this cause, we deem a sufficient answer to this assignment of error. The entry of this judgment *nunc pro tunc*, was, at best, but part and parcel of the jumble of legal technical terms which are so abundant in this case. We

have already stated, that we should disregard entirely all the show of pleadings after the parties were at issue, and this judgment is only an extension of what should, in the state of the record at the time it was rendered, never have had a beginning.

It is also assigned for error, that the court did not appoint commissioners to settle the estate. As we construe the act of 11th of February, 1850, it was not the duty of the circuit judge to appoint such commissioners. Under the law, as it stood prior to the passage of this act, it would have been the duty of the Circuit Court to have appointed commissioners; but the language of the act is: "And said court shall take jurisdiction of, and proceed therein, as the Probate Court might have done." This language we deem clear and unequivocal. It is simply the substitution of the circuit for the probate judge; and in such cases, the Circuit Court becomes, for the time being, a Probate Court, and should, in all respects, be governed by the rules operating upon the Probate Court.

The fourth and fifth assignments of error, that the court had no jurisdiction to settle the estate in the manner in which it did, and that the court erred in the decree which it rendered in the cause, we do not deem it necessary to notice, except to remark, that we consider them as covered by what we have already said or shall hereafter say in the progress of this discussion.

To the sixth assignment of error we have but to remark, that we do not consider that the statute of limitations of six years applies to the case presented by the plaintiff's petition, and the demurrer to it was therefore properly sustained.

The seventh and last assignment of error presents the various matters exhibited by the bill of exceptions. It seems that, at the threshhold of the trial of the cause in the Circuit Court, the defendant made four objections to proceeding with the trial, to-wit: 1st, that it did not appear from the record that any sufficient notice of the settlement had been given, by publication or otherwise; 2nd, that no citation had issued to Shackelford to appear and settle his accounts; 3rd, that the court was bound to appoint commissioners to settle the estate; 4th, that the court had no jurisdiction of the cause.

With regard to the first of these objections we have to

remark, that this case had been pending in court since 1846, and the defendant had had an abundance of time to take all necessary steps to call in the creditors of the estate and other persons interested therein. When an executor goes into court to settle his accounts, it is his duty to see that the proper steps are taken to give the necessary notices. The record shows no effort on the part of the defendant to give the legal notices, and he would not be heard to make the objection on the trial that he had not done his duty. Besides, in the situation in which this defendant presents himself before the court, we do not regard his position as one to which the ordinary rules as to notice would be applicable. He is not the sole executor, nor is he called before the court but for a single purpose, viz., to pay in the amount of the note, as to which the other and active executor has no other means for the enforcement of its collection. Besides, the estate is an insolvent one, and all the creditors are parties to the proceeding; if they are satisfied with the notice given, whatever it may have been, or if there was none at all, it does not lie with the defendant to make the objection.

As to the second objection, it is sufficient to say, the defendant answered the petition of the plaintiff on two several occasions, viz.; once on the 14th of December, 1846, and again on the 13th day of May, 1848. These answers, independent of two notices found in the record, one served on him and the other on his counsel, by the sheriff, and citing him to appear before the court and settle his accounts, we think preclude him from saying that he has not been cited to settle his accounts. Besides, that is a novel objection for a man to make, in person or by counsel, in open court on the trial.

As to the third and fourth objections, they have already been disposed of by what has been already said in the preceding remarks.

We see no error in the court's looking at the papers in the cause on the trial, nor in allowing the plaintiff to offer in evidence the note of Job Mason, due to himself, without proof of its execution. Nor was there error in allowing the note to be read in evidence, on which the defendant is sought to be charged, without proof of its execution. The execution of neither of these notes could be denied, without being put in issue by the proper plea. Nor was there error in the court's compelling the

defendant to contest the plaintiff's claim immediately, if at all. It surely would have been most extraordinary, if, after the trial was in part concluded, the defendant could, for the first time, raise an objection to the justice of the plaintiff's demand against the estate of Mason, and have allowed to him then three months more for the purpose of contesting the same. The court was right in proceeding with the trial.

The defendant then contended, that the estate had never been declared insolvent, and objected to proceeding further for that reason. This objection has already been disposed of by what has already been said upon this subject.

"The defendant then objected that there was no sufficient proof of any claims against the estate, and that the creditors had not proved their claims sufficiently and legally." We have already seen that the plaintiff had sufficiently proved his claim, and if he did not object as to the degree of proof of the other creditors, and none of the creditors made any objections, we see no reason why the defendant should be allowed to make any.—Besides, it is not stated what the proof was, which was made by the creditors, other than as to that offered by the plaintiff, and, therefore, it is impossible for us to say whether the proof was sufficient or not. This view is at once sufficient to show that there is no error apparent from this ruling of the court below.

The defendant then proved, by the plaintiff, that his particular demand had never been presented to him as co-executor, and on that account moved the rejection of the plaintiff's claim. The court overruled this objection, and we think very properly. On referring to one of the early schedules of the debts of said estate, filed in the Orphans' Court by the plaintiff and defendant, as co-executors of the last will and testament of Job Mason, deceased, we find this claim of the plaintiff there in the schedule, and the same is signed by the defendant as one of the executors. This was as long ago as 1828. No objection seems to have been made to the plaintiff's demand, from that time to the present, and yet the defendant has been all the while the co-executor of the estate. We think it is now too late for the defendant to deny that the claim had been presented to him; in other words, that his acts in the premises estop him from denying such presentation.

We have but to add, that we find no error in the record of

which the defendant can complain, and the judgment of the court below is affirmed.

LIGON, J., not sitting.

ROBINSON *vs.* DRUMMOND.

1. Although the several counts in a declaration should be considered, on demurrer, as separate and distinct, yet, where one expressly refers to another, the latter, although abandoned, may be looked to in aid of the former.
2. In an action of slander for words spoken charging plaintiff with the crime of arson, the words laid were: "I next morning saw a track going to, and returning from the house. The toes turned in; and I know of but one man who owes me enmity enough to do such a thing, and you know whom I mean, B. D." (plaintiff): *Held*, that the words were not, of themselves, actionable; and, as there was no averment of any matter of fact tending to identify the plaintiff as the person who made the tracks, the count was demurrable.
3. When justification and the general issue are pleaded to an action of slander, if defendant fails to establish the former plea, it may be considered by the jury in aggravation of damages.

APPEAL from the Circuit Court of Autauga.
Tried before the Hon. NAT. COOK.

This was an action of slander, brought by Benjamin J. Drummond against Raymond Robinson. The declaration contained two counts, to each of which there was a demurrer. The demurrers were overruled, but the plaintiff afterwards abandoned his first count. The defendant pleaded not guilty and justification. The facts are particularly noted in the opinion.

BELSER & RICE, and WATTS, JUDGE & JACKSON, for appellant:

1. If the words set forth in a count in slander are not actionable *per se*, an innuendo that by the speaking of such words the defendant meant to impute some felony to the plaintiff, will

not help the count. Such count is defective, without an averment that the words were spoken with intent to charge a crime. —Andrews v. Woodmansee, 15 Wend. R. 232; Gibson v. Williams, 4 Wend. R. 321; Rundell v. Butler, 7 Barb. Sup. Ct. Rep. 260; Dorland v. Patterson, 23 Wend. Rep. 422; Sasser v. Rouse, 13 Iredell's Law Rep. 142.

2. If the words are not actionable *per se*, they will not support an action of slander, unless two things are averred and proved: 1st, that defendant meant thereby to impute a felony or crime; 2d, that those who heard the words spoken, understood them to convey such slanderous imputation. The reason for this is, that both malice and damages must concur, in order to give a ground of action.

3. Where a statute gives the right to defendant to plead as many pleas as he deems necessary to his defence, the exercise of that legal right cannot constitute a legal ground for increasing the plaintiff's damages. Whatever may have been the common law, in a case where the plea of justification only was pleaded, can make no difference, in a case arising under our statute.—Montgomery v. Richardson, 5 Carr. & Payne 247; Firmin v. Crucifix, 5 Carr. & Payne 97. These cases show, that the rule which applies where there is only one issue, has no application where there are several. If it be conceded that, at common law, the charge of the court was correct, our statute changes the common law in this respect. It would be strange to hold that where a statute gives the defendant a right, the exercise of that right should increase his liability.—Swails v. Butcher, 2 Carter's (Indiana) Rep. 84; Wright v. Lindsay, 20 Ala. Rep. 428.

4. One of several pleas cannot be "given in evidence" by the plaintiff.—Harrington v. Macmorris, 5 Taunton's Rep. 233; Wright v. Lindsay, 19 Ala. Rep. 428. In the assessment of damages, as well as in finding the facts, the jury are confined by their oath, and by the law, to the matters which are "given in evidence." If one of several pleas cannot be "given in evidence" by the plaintiff, the jury cannot consider it in mitigation, or in aggravation of damages.—Montgomery v. Richardson, 5 Carr. & Payne 247; Firmin & Crucifix, 5 Carr. & Payne 97.

5. The charge cannot be supported; for it left the jury no discretion; it declared as matter of law, that they "must"

consider the plea of justification, and the failure to prove it, in aggravation of damages. This never was the rule, and never ought to be; for cases can easily be imagined, where the failure to sustain such plea by proof, could not justly be taken as aggravation.

6. The general rule excludes the opinion of witnesses. The opinions allowed as evidence in this case, do not fall within any exception to the general rule.—Sasser v. Rouse, 13 Iredell's Law Rep. 142.

7. The opinion of the witness as to how he understood the words, was irrelevant; for there is no averment that any person understood the words in any particular sense.—Before proof on that point could be admitted, it was essential that there should have been an averment to which it could apply.

The case of Jackson v. Stetson *et ux.*, 15 Mass. Rep. 43, is pronounced by Judge Woodbury "contrary to immemorial practice, as well as authority."—Cilley v. Jenness, 2 New Hamp. Rep. 89, 90.

Elmore & Yancey, *contra*:

1. The demurrer was properly overruled; because the words spoken contained an allusion to the averment of the felonious burning of the house, a statement that he had examined the tracks going to and fro, and that there was but one man inimical enough to do such a thing, viz. Drummond. The previous averment is, that he spoke these words "of and concerning the plaintiff." The case cited from 23d Wendell sustains this declaration; the first count sustained in that case is the only one analogous to this declaration. Reference may be made in a declaration to a previous count, which has been held bad on demurrer, for dates, and, by parity of reasoning, to averments and inducements.—Mardis v. Shackelford, 6 Ala. 433; Morrison v. Spears, 8 *ib.* 93.

2. If words are ambiguous, or doubtful in meaning, or in their applicability, plaintiff has a right, in an action of slander, to inquire how the bystanders understood them.—2 Stark. on Slander, m. p. 51; 2 Sup. U. S. Digest, p. 326, § 229; 15 Vermont 245; Morgan v. Livingston, 2 Richardson 582.

3. A plea of justification in slander, if not sustained, is an aggravation of the slander.—Lea v. Robertson, 1 Stewart 138;

Nelson v. Nations, 5 Yerger 211; Jackson v. Stetson, 15 Mass. 48. The case in 2d Carter, cited by defendant, contains no reason for the opinion; it is doubtless based on the opinion, that, if the testimony under the plea of justification fails to establish it, it may yet be looked to in mitigation.—See, also, U. S. Digest for 1850, p. 310, § 92; Shelton v. Simmons, 12 Ala. 466. The statute which allows a defendant to plead as many pleas as he may deem "necessary to his defence," is like any other law of privilege; it must be exercised with reference to the rights of others; as, the law of speech, of writing and publishing, of carrying arms, &c. It is not "the exercise of that legal right," but its abuse, which is made a "legal ground for increasing plaintiff's damages;" the failure to prove the plea, shows that it was not necessary to defendant's defence. Our statute does not take away the common law liability as to such a plea; the extension of privileges cannot be argued as an exemption from the consequences of a malicious act. The plea of justification was not offered in evidence under the general issue. The slander was proved; and the charge was, that, if proved, the failure to sustain the plea of justification was an aggravation.

The case of Jackson v. Stetson, *supra*, has never been pronounced by Judge Woodbury "to be contrary to immemorial practice, as well as authority;" on the contrary, in the case cited in 2 New Hamp. 89, he decides, that where a creditor, in one count of his declaration, admits certain articles to have been returned, he cannot recover for those articles.

CHILTON, C. J.—The declaration contains two counts, to each of which there was a demurrer, but they were held sufficient. Afterwards, the plaintiff below abandoned the first count, so that if there was error in overruling the demurrer to it, no injury has resulted to the defendant by reason of such error.

We shall first address ourselves to the questions presented in argument upon the sufficiency of the second count.

It is insisted on the part of the plaintiff in the appeal, that this count is bad, because the words charged are not actionable in themselves, and there is no averment that they were spoken with intent to charge a crime.

We should observe that, in considering this count, it should not be regarded as isolated from the first count in the declaration, although that was abandoned; but so far as that count is referred to in this, it should be looked to as aiding it. The several counts of a declaration are regarded as its several parts, or sections; and it is not only permissible, but often very proper, to avoid unnecessary repetition and prolixity, that one should refer to another. If, however, there is not an express reference, the several counts are considered as distinct as if contained in separate declarations.—1 Saund. on Pl. & Ev. 417; Mardis' Adm'r v. Shackelford, 6 Ala. R. 436, and cases cited.

The first count avers, by way of inducement, that one Raymond Robinson, before the speaking of the words, was the owner of a dwelling house, which had been feloniously set fire to, and burned down in the night time; that the plaintiff, before that time, had never been suspected of the crime of arson, &c., but the defendant, maliciously intending to injure him, and to cause it to be suspected and believed that he had been, and was, guilty of arson, and to subject him to the pains and penalties provided by the laws of this State against persons guilty thereof, heretofore, to-wit: on, &c., spoke and published, &c.

The second count, referring to the first, avers, that on the day and year aforesaid, at, &c., aforesaid, the said defendant, in a certain other discourse, which he then and there had, of and concerning the said plaintiff, and of and concerning the said burning of the said house, and further contriving and intending as aforesaid, in the presence and hearing of said last mentioned citizens, falsely and maliciously spoke and published, of and concerning the said plaintiff, and of and concerning the said burning of said house, the false, scandalous, malicious and defamatory words following, that is to say: "I (meaning thereby the said defendant) next morning noticed a track going to and from the house. The toes turned in; and I (meaning said defendant) know of but one man who owes me enmity enough to do such a thing, (meaning thereby the felonious burning of the house aforesaid,) and you (meaning one of the said last mentioned citizens) know whom I (meaning said defendant) mean, Ben Drummond;" thereby, then and there, meaning and intending to charge said plaintiff with having feloniously set fire

to, and burned in the night time, the inhabited dwelling house of said defendant. By means whereof, &c.

We have thus carefully extracted so much of the two counts as must be taken together, in order that we might the more accurately determine whether they contain sufficient averments to authorize the inference of the imputation of a crime.

The general rule, in slander, requires that the words should be taken in their ordinary acceptation; and to enable the court to determine whether, when so considered, they impute a crime, the words must be set out, at least substantially, in the declaration.

Yet, as the vilest slanders may be perpetrated by words, which, in themselves considered, may appear harmless, but which, if taken in connection with surrounding facts and circumstances, may impute the commission of crime, certain exceptions have been engrafted upon the general rule, which may be thus stated:

1. Where the words, in their ordinary acceptation, do not impute a slanderous charge, *but are susceptible of such a meaning*, and the plaintiff avers certain facts with which they stand connected, or to which they relate, and from which it may reasonably be inferred that they were not used in their ordinary sense, but as imputing a crime, upon proof of such averment, it is to be left to the jury to decide whether the words were used in the sense imputed to them. To say of A, "he is the man who took B's horse," implies no charge of a crime, for he may have taken him very innocently by the owner's consent; but if it be averred that B's horse had been feloniously stolen from him, and in a conversation in reference to said larceny, and as to the person who committed it, these words were spoken, then, on proof of such averment, it is for the jury to determine whether the word "took" was not used as a synonyme for "stole," and was not intended to impute to the plaintiff the commission of a larceny.

2. The second exception is, where the charge is made by the use of some cant phrase, nick-name, or words having a local meaning, or by ironical expressions, in all cases, where the defendant, taking advantage of some knowledge which the hearers possess, and which will enable them fully to interpret and comprehend his meaning as imputing a slanderous charge, yet clothes

the charge in such language, as, taken in its ordinary sense, would appear harmless, and impute no crime, the plaintiff may recover, by averring and proving the meaning of such phrases, or words of local signification, or that the words were ironically used, and were employed to convey, and did convey to the hearers, the imputation of a certain crime, or by averring the knowledge of the hearers with respect to some collateral fact, which enabled them to understand the meaning, and to affix the slanderous import. In such cases, however, as fall within this exception, it must be averred that the defendant meant to impute the slanderous charge by the use of the words, and "that they were so understood by the persons to whom they were addressed."—Sasser v. Rouse, 13 Ired. Law Rep. 145, where it is correctly said, these averments are traversable, and must be proven; and that this is the only case where the witness is allowed to give his understanding of the meaning of the words, because the averment could be proved in no other way. Mr. Starkie, we are aware, lays down a different rule, as to the examination of witnesses to prove their understanding, and does not confine such proof to cases of this kind; but he is not sustained, either upon principle, or the authority of adjudged cases; for, if witnesses were in all cases allowed to depose as to the sense in which they understood the words, no one would be secure against slander suits, who should speak in the presence of ignorant, prejudiced or corrupt persons, however inoffensive his language might be in its ordinary signification.—13 Iredell's Law Rep., 145, 146; 11 *ib.* 358.

3. The third exception is, where the words impute a slanderous charge in their ordinary sense, but the defendant proves a fact from which an inference may be drawn that they were not used in that sense, he may insist upon having the jury pass upon the intent.

Applying these rules to the case before us, it is clear that it is not brought within either of the exceptions above laid down. There is no averment, from which an inference may be drawn that the words are used in any other than their ordinary sense. The question, then, arises, on the demurrer, whether, when thus construed, they impute a charge of a criminal offence. Omitting the innuendoes, which only serve to explain, but cannot enlarge the sense, the words are, "I next morning saw a track going

to, and returning from the house. The toes turned in; and I know of but one man who owes me enmity enough to do such a thing, and you know whom I mean, Ben Drummond." It is not stated, or intimated, that the track was that of the plaintiff. There is no averment that there was an attempt to describe the plaintiff, or to identify him as the person making the track, and consequently as the person who set fire to the dwelling, by stating that, from any peculiarity of his walk or conformation, he would likely have made such track, and thus to single him out as the guilty agent, by the expression "the toes turned in."

The latter clause of the sentence clearly involves no slanderous charge; it merely amounts to an assertion that the defendant knew of but one man who owed him enmity enough to do such a thing, and that was the plaintiff. If, however, there had been an averment of some matter of fact tending to identify the plaintiff as the person making the track, aided by the fact that his enmity towards the defendant furnished a motive for doing the act, the cause then should properly have gone to the jury, to determine whether such words, coupled with such averment, do not impute a criminal charge. As the count now stands, unaided by any such averment, we cannot hold, as a matter of law, that it contains an imputation of a crime. The stating of the intent and meaning by way of innuendo, as we have said, does not aid the count, as it does not enlarge the sense of the words.

For the error in overruling the demurrer to the second count, the cause must be reversed and remanded; but, as there is another question involved which will arise upon a subsequent trial, it is proper now to decide it. The question alluded to is, as to the effect of the plea of justification upon the subject of damages, when that plea is accompanied with the general issue.

The court below was of opinion, that that plea must be looked to, if the defendant had failed to prove it, in aggravation of damage. We are of the same opinion. When the jury have ascertained, upon the general issue, that the defendant maliciously spoke and published the slander as charged, and come to try the question whether the charge was true upon the plea of justification, they see in this plea, if it be false, a re-affirmation of the slander upon the records of the court, by which the defendant has done the plaintiff a new injury. If the evidence

in support of the justification only goes part of the way, and fails to make it good, it is disregarded, as it is unjust to allow a defendant to obtain any advantage by offering to prove more than he can, and this, too, by proof which could only be introduced under his false plea, and would have been rejected under the general issue. See cases cited by the counsel for defendant in appeal. The statute which authorizes the defendant to plead as many pleas as is necessary to his defence, does not affect this principle.

We need not examine the other questions, as they will not likely again arise.

Judgment reversed, and cause remanded.

LOGAN *vs.* THE STATE.

1. Under a count in an indictment for gaming, charging the defendant with playing cards "at a storehouse then and there for retailing spirituous liquors," no conviction can be had, upon proof that the playing took place "near a house formerly used for retailing, but which was not then so used."

ERROR to the Circuit Court of St. Clair.

Tried before the Hon. TURNER REAVIS.

JAMES LOGAN and Allen Box were indicted for gaming. The indictment contained eight counts; the first charging, that the playing took place at "a tavern;" the second, that it took place "at a storehouse then and there for retailing spirituous liquors;" the third, "at a place where spirituous liquors were then and there retailed;" the fourth, "at a place where spirituous liquors were then and there given away;" the fifth, "at a house then and there a public house;" the sixth, "on a highway;" the seventh, "at a public place;" and the eighth, "at an outhouse where people did then and there resort."

On the trial of Logan, the State proved that he played cards, between the time specified in the indictment and the time the indictment was found, in said county, "at a place nineteen yards distant from the side of a highway in said county; that

the playing was in the night time, between the hours of ten and twelve, and by dim moonlight; that there were no persons present but those engaged in the game, and that no person passed the road while the game was going on; that the light afforded by the moon was so dim, that no person passing by along the road could have distinguished that the players had cards in their hands, though the persons themselves might have been seen; that the card-players themselves were compelled to hold the cards close to their eyes, to see what they were; that there were no obstructions between the card-players and the road, but they were nineteen yards from it, on a log, playing by the dim light of the moon; that this was at a place near which there were no houses, except a house that had been used for retailing, but which was not used for that purpose at that time; that there were no persons at, in or about said house, except the card-players, and they were about twenty-nine yards from it. This was all the proof, and the court charged the jury, that they must find the defendant guilty under the second count of the indictment, if they believed the evidence. To this charge the defendant excepted."

J. L. Curry and S. F. Rice, for plaintiff in error.

M. A. Baldwin, Attorney General, *contra*.

LIGON, J.—The charge of the court is erroneous. The proof shows, that no spirituous liquors were retailed at the house near which the playing took place, at the time the parties played. The second count in the indictment, under which the conviction was had, charges the playing to have taken place "at a storehouse *then and there* for retailing spirituous liquors." Proof that persons played cards at or near a house which, at some indefinite period of past time, had been used as a storehouse for retailing spirituous liquors, does not make out the offence charged; yet, such was the ruling of the court below.

Whether the proof would not have authorized a conviction under the sixth or seventh count in this indictment, we do not decide, as the only question before us relates to the charge of the court, and that confines the jury to the consideration of the charge made in the second count alone.

Let the judgment be reversed, and the cause remanded.

LAWSON'S ADM'R *vs.* LAY'S EXECUTOR.

1. If an administrator in chief make a loan or gratuitous bailment of a slave belonging to the estate, both he and his bailee are guilty of a conversion; but the administrator himself cannot avoid the bailment, nor sue for the recovery of the property.
2. The statute of limitations begins to run in favor of the loanee or gratuitous bailee of the administrator in chief, from the time of the appointment of an administrator *de bonis non.*
3. If the loanee of the administrator marry, and her husband come into possession of the slave, he is liable for damages in detinue, both for his own detention and that of his wife before marriage.
4. And if he die before suit brought, and the slave come to the possession of his executor as assets, the latter is liable for his own detention and that of his testator, and no demand is necessary.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. TURNER REAVIS.

DETINUE by Alexander Lawson, as administrator *de bonis non* of Elijah Lawson, deceased, against Thomas T. Tyree, as executor of Amos Lay, deceased, for a slave named Isaac. The facts of the case appear at length in the opinion of the court, and in the report of the case in 23 Ala. 377.

ROBERT H. SMITH, for appellant:

Although the loan of the slave was good against the administrator in chief, and he could not sue, (Pistole v. Street, 5 Porter,) yet, as to the estate, and the administrator *de bonis non*, it was void.—Ventress v. Smith, 10 Peters 173, 176; Weir v. Davis & Humphries, 4 Ala. 445; Dearman v. Dearman & Coffman, 4 *ib.* 526; Swink's Adm'r v. Snodgrass, 17 *ib.* 653; Fambro v. Gantt, 12 *ib.* 298; Steger v. Bush, 1 S. & M. Ch. R. 188. This loan, then, was a conversion, on the part of the widow and Sanderson, for which Lay, by marriage, and taking the slave, became liable.—See previous opinion in this case, 23 Ala. 388.

The slave was not held by such adverse possession, as will authorize Lay to invoke the statute of limitations.—Angell on

Lim. 402 § 5, 327 § 27, 329 § 8; Ward v. ———, 2 Har. & McH. 145; Strong v. Strong, 6 Ala. 347. Nor could he invoke the statute of limitations, because the illegal contract was binding on Sanderson, and he could not sue (Pistole v. Street, 5 Porter 64); and there was no one in being who could sue, until Lawson was appointed administrator *de bonis non.*—Murray v. East India Co., 5 Barn. & Adol. 61; Angell on Lim. 55, and cases cited in note 1; 6 Ala. 605; 2 Porter 171; 3 Stewart 172; Hopper v. Steele, 18 Ala. 828, 837.

The transaction was a fraud on the estate, and therefore the statute does not run.—Powell v. Wragg & Stewart, 13 Ala. 161; Beach v. Catlin, 4 Day's R. 284.

As to the time from which hire should have been given: When the case was here before, one of the errors assigned by the present defendant in error was, the ruling of the court in allowing damages from the time of suit brought; the court held, that there was no error in this prejudicial to him. The question now is, was there any error in this charge prejudicial to the present plaintiff in error. It is insisted, that damages should have been allowed from the time the wrong was done. The action of detinue is nothing but debt in the *detinet*: the damages given are for the wrongful detention, and must be from the conversion, particularly, when a state of things was created by the wrong, whereby no one was *in esse* who could sue.—Glascock v. Hays, 4 Dana 58; Miles v. Allen, 6 Iredell 88. The authorities which assert general language seemingly adverse to this, use it in reference to particular facts, causing it to be true in those cases, but not applicable to this.

S. F. Hale, *contra*:

The only question is, as to the time from which plaintiff shall recover hire by way of damages for the detention. The negro went into possession of the widow, before her intermarriage with defendant's intestate, under a contract with the administrator in chief, who afterwards died before the termination of the bailment. There was, then, no person in being, after the termination of the bailment, to whom defendant's intestate could deliver the slave, until the appointment of the present administrator in 1851. All the authorities hold, that the unlawful detention of the property is the gist of the action

of detinue; and there can be no unlawful holding, until there is some one in being to whom the defendant may lawfully deliver the property; and until there is an unlawful holding, or detention, plaintiff is entitled to no damages. This is understood to be the ruling of the court, in this case, at the last term. —See the authorities cited on this point, by plaintiff in error, in that case.

At common law, an administrator was the owner of the personal estate of the decedent, and could bail the goods belonging to the estate, and there is nothing in our statutes prohibiting him from making such bailment.

GOLDTHWAITE, J.—The record before us presents the following state of facts: Elijah Lawson died in 1828, owning the slave sued for, and leaving a widow and three children, the oldest being seven years of age. Shortly after his death, Lemuel G. Sanderson took out letters of administration on his estate, and in his representative character took possession of the slave, and subsequently allowed him to go into the possession of the widow without hire, with the understanding that she was to have him for the purpose of assisting her to raise her children; no time being fixed for the limitation of the possession on the part of the widow, except the raising of the children. The slave remained in possession of the widow, under the possession thus obtained, until the year 1832, when she married Amos Lay, and from that time in the possession of the husband, until his death in 1851, and then went into the possession of his executor as assets, the letters testamentary having been taken out in the same year. Sanderson died, in 1834, without having administered the slave; and in 1851 letters of administration *de bonis non* upon the estate of Elijah Lawson were granted to the plaintiff, who sued the executor of Lay in detinue for the slave, no demand having been made before suit. The principal question is, as to the time the plaintiff is entitled to recover damages.

We think it is clear that Sanderson, the first administrator, had no right to make the disposition of the slave which he did. It is true, the statute (Clay's Digest, 223 §13) does not, in express terms, declare a loan or bailment of this character unlawful or void; but it is equally against the policy of the statutes,

which govern the action of administrators, as a private sale; indeed, it strikes us as a manifest absurdity, to hold that, while the law prohibits a private sale, it recognizes a loan for any number of years. Here was a gratuitous disposition of the property for more than fifteen years; and we have no hesitation in declaring, that it could pass no right as against the estate. Whatever may have been the intention of the administrator, or however much the motives which prompted him to action may be respected, it is impossible to regard the act in any other light than as a violation of his trust, and void at law, as against those whose legal rights were affected by the transfer.—Swink v. Snodgrass, 17 Ala. 653. Sanderson, however, could not be allowed to avoid the disposition he had made of the slave, on the ground that it was in violation of his trust, (Pistole v. Street, 5 Port. 14; Fambro v. Gant, 12 Ala.; Swink v. Snodgrass, *supra*; Kavanaugh v. Thompson, 16 Ala. 818); and as the bailment would be binding upon him, and he could not sue, the statute of limitations did not commence running until the appointment of the administrator *de bonis non* in 1851, since, until then, there was no one to maintain the suit, against whom the statute could operate.—Neil v. Cunningham, 2 Port. 171; Sledge v. Clopton, 6 Ala. 589; Hopper v. Steele, 18 Ala. 828. And as the assets of the estate, when disposed of by the administrator in violation of his trust, may, when they remain in specie, be covered at law, by the administrator *de bonis non*, (Swink v. Snodgrass, *supra*,) it follows that the plaintiff is entitled to recover.

The loan of the slave by Sanderson, being unauthorized, was a conversion; and as the trust which it was in violation of was created and governed by the law, the taking and retention of the property by the widow, under the disposition thus made, was equally a conversion on her part; and the damages for such detention could be recovered after her marriage, in detinue against the husband and wife (2 Leigh's N. P. 782; Co. Litt. 351); but if the husband died before judgment, his liability would be discharged.—Woodman v. Chapman, 1 Camp. 189; Maffit v. Commonwealth, 5 Barr 359. In the present case, as the action was not commenced until after the death of the husband, no recovery could be had against his personal representative, for damages accruing by the act of the wife before

coverture; and the right to a recovery being settled, we are thus brought to the question, whether damages can be recovered, in the action against the executor of the husband, for the detention during the marriage. We held in Brewer v. Strong, 10 Ala. 961, that an action of detinue could be maintained against the administrator in his representative capacity, upon the possession of the intestate, coupled with the detention by his representative after his death; and in Easly v. Boyd, 12 Ala. 684, we decided, that the same action could be revived against the administrator, where the thing sued for came into his possession as assets. Of course, in the last case, damages could be recovered for the detention in the life-time of the intestate; and if so, we can see no reason why they cannot be recovered for such detention, when the action is against the administrator, and is based in part upon such detention.

Is a demand necessary, to recover damages in this action for an unlawful detention, before the commencement of the suit?

It was formerly held, that detinue could not be maintained, unless the defendant came lawfully into the possession of the goods (3 Blackstone's Com. 152; Com. Digest, Detinue, (D); Sel. N. P. 657); and hence, we find it laid down in the old writers, that *uncore prist* is a good plea in this action.—5 Com. Dig. 663. So in Roll. Abr. 574 it is said, "if the defendant, in an action of detinue, come at the first day, and plead that he hath at all times been ready to deliver the thing for which the action is brought, to the plaintiff, he is not liable for the detention thereof." This rule is laid down as applicable in all cases to this action, and there is good reason to apply it thus broadly when it was thought necessary that the taking should be lawful in order to give a recovery. To cases of this character the principle still applies; and whenever it is necessary to change a lawful possession into a wrongful detention, as to terminate a bailment, then no damages can be recovered, except from the service of the writ, unless a demand has been made. But the old doctrine, as to a lawful taking to sustain detinue, is gone with us (Pierce v. Hill, 9 Port. 151); and there can be no good reason for a demand, where the possession is unlawful. If it was essential in such cases, the necessary consequence would be, that the wrong-doer would not be liable to damages, so long as he could keep out of the way of a demand—a result so man-

ifestly unjust, that we should be inclined to doubt the soundness of any authorities which would lead to it. Our conclusion is, that in this action the plaintiff is entitled to recover damages for the wrongful detention, although no demand has been made; and if a party, as in this case, is placed in a condition in which it is impossible to restore the thing to the owner, he is still responsible for all the consequences of a possession, which commenced unlawfully.

As to our decision when the case was last before us (23 Ala.): It has no bearing whatever upon the case as now presented. There the court charged, that the plaintiff was entitled to recover from the issue of the writ, and the defendant complained of that charge. It was held, that the decision, if wrong, was an error in his favor; and, although the language used by the judge who delivered the opinion, may have misled the court below, it does not at all conflict with the views we have expressed in this opinion.

As the plaintiff, upon the facts stated, was entitled to recover for the detention of the slave, from the time he came into the possession of the defendant's testator, which the record shows was at his intermarriage with Mrs. Lawson, the ruling of the court upon this question was wrong.

Judgment reversed, and cause remanded.

ABERNATHY *vs.* BOAZMAN.

1. A deed which is void as to third persons on account of an adverse holding, is nevertheless valid and binding as between the parties themselves; and the fact that the vendee was in possession, as tenant of the adverse holder, does not affect the principle.
2. In an action for a breach of covenant of title, evidence that the vendee himself was in possession, as tenant of an adverse holder, at the time his deed was executed, is not admissible for the vendor: the fact that both parties knew of the adverse holding, and that there was no fraud, does not relieve the vendor from the liability to make good his covenant.

ERROR to the Circuit Court of Lawrence.

Tried before the Hon. JOHN E. MOORE.

THIS was an action of COVENANT by Hugh D. Boazman against John T. Abernathy, for breach of warranty of title to a certain tract of land, which Abernathy had conveyed to Boazman by deed dated June 8, 1843. On the trial, the plaintiff read in evidence his deed from Abernathy, containing the usual warranty of title; and then offered the record and proceedings had in a certain suit between himself and one William Kyle, showing that Kyle had sued him for this land, and had recovered a judgment against him, on which a writ of *habere facias possessionem* had issued; he also proved that he had duly notified Abernathy to defend that action. He then introduced one Points, as a witness, who testified, that he, as the agent of said Kyle, had received possession of said land from plaintiff.

On cross examination, said Points stated, "that he had acted as agent for said Kyle, from the year 1839, up to the time of the setting up claim to said land by Boazman, under said deed from Abernathy, which was after said deed; that up to said claim of title by said Boazman, from the year 1840 inclusive, said Boazman had held possession of said land as the tenant of said Kyle; that witness acted as agent for said Kyle, and as such had rented said land to said Boazman, and said Boazman had thus held said land in tenancy." The plaintiff objected to this testimony, and moved to exclude it; "the defendant insisting on said testimony, because it tends to show that Kyle was, by his tenant, said Boazman, in adverse possession of said land at the date of Abernathy's deed to said Boazman; and because it tends to show that Boazman knew of Kyle's adverse claim and possession against Abernathy; and because it tends to show that no fraud was practiced by Abernathy on Boazman." The court excluded the testimony, and the defendant excepted; and this ruling of the court is now assigned for error.

WILLIAM COOPER, for plaintiff in error:

The evidence excluded by the court below should have been admitted; for, when admitted, it would have shown a state of facts which would have rendered the deed and covenants sued on void, because of the adverse possession at the time they were

made; the deed and covenant were illegal and champertous; and being against public policy, each party was in *pari delicto*, and neither could enforce the contract.—Camp. v. Forrest, 13 Ala. 114; Williams v. Hogan, 1 Meigs' R. 187; Williams v. Johnson, 5 Johns. 500, 504; 3 Metcalf 98. The contract is void at common law, and the statute is corroborative of the common law.—Dexter & Allen v. Nelson, 6 Ala. 68; Broadstreet v. Huntington, 5 Peters 402; 9 Ala. 418; Abercrombie v. Baldwin, 15 Ala. 371; 6 Blackf. 99; 4 Humph. 218. If the vendee knew that the vendor was out of possession, this excuses performance of contract.—Beck v. Simmons, 7 Ala. 71. Contracts void for part illegal consideration, are void *in toto*.—Ripley v. Yale, 19 Vermont 156; 5 Barr. Contracts contrary to common or statute law are void, and no court will enforce them, either in whole or in part.—Wheeler v. Russell, 17 Mass. 258; Hale v. Henderson, 4 Humph. 199; Jackson v. Walker, 5 Hill's (N. Y.) R. 27; 1 Parsons on Contracts, p. 382, note (a.)

The apparent hardship should not influence the court against Abernathy. The deed shows that Boazman gave $400 for upwards of four hundred acres of land; and he now asks to keep all but forty acres, and get all the money and more back. Strictly, he should recover nothing.—Corprew v. Arthur, 15 Ala. 525.

There is no difference between a contract void *per se* and *malum prohibitum*; they stand on the same footing, and no court will aid them.—1 Watts & Serg. 181; 4 Serg. & R. 159; 19 Conn. 421; 4 N. H. 290; 3 Term R. 418; 4 Burr. 2069; 8 Barb. 449; 11 Iredell 112; 14 S. & M. 18; 14 Penn. R. 18.

L. P. & R. W. Walker, *contra*:

1. Adverse possession at the time of the sale avoids the deed only as against the party in possession.—Rawle on Covenants, p. 49; U. S. Ann. Digest, 1850, p. 13, § 1. And as between the parties themselves, it is valid, and will not merely operate by way of *estoppel* to the grantor, but the covenants in the deed may be made available to the grantee.—Rawle's Cov., p. 53; 9 Johns. 55; 9 Wend. 516; 2 Hill (N. Y.) 528; 15 Wend. 165; 10 Mass. 367; Co. Litt. 369; Cro. Eliz. 445.

That the covenant may be enforced, although the land was held adversely at the time, is shown by those cases which hold, that the covenant of warranty is broken where the covenantee cannot obtain possession in consequence of the land being adversely held at the time of the conveyance.—Rawle's Cov., pp. 220 to 223; 6 Ala. 60; 7 *ib.* 83; 9 *ib.* 85; 11 S. & M. 206; 12 *ib.* 473. Boazman's knowledge of Kyle's title constitutes no defence for Abernathy.—Rawle's Cov., 123, 124, 125, 527; Dunn v. White, 1 Ala. 646; 8 Mass. 146; 3 Munf. 68.

2. The covenant of seizin is a covenant of ownership, and is broken by the mere existence of an adverse paramount title; and nothing further is necessary to sustain an action for its breach.—2 Hilliard on Real Property, p. 373 to 382; 3 Hill 134. A judgment in ejectment, recovered by a stranger against the covenantee, and an entry under it, with proof that the covenantor had due notice of the pendency of the action, is sufficient evidence of the breach of a general warranty, and actual ouster by writ of possession is immaterial.—2 Green. Ev. § 244; 1 Barr 501; 4 Binney 352. The fact that Boazman had notice of Abernathy's want of title, is immaterial.—U. S. Ann. Digest, 1848, p. 86, §§ 46, 50; 5 Barr 317. A covenantee may be evicted, although he has never been in the actual possession of the land; if one enter, and hold adversely, it is equivalent to eviction.—Sedgwick on Damages, p. 179; 2 Wheat. 46. A covenantor, who has notice of the suit, is not permitted, in a suit against himself on his covenant, to show title in himself at the date of his conveyance.—*Ib.* § 316. Evidence of mistake in describing the boundaries of a deed cannot be given at law.—3 Phil. Ev. 1429, 1449; 5 Hill 272; 10 Ala. 548; 11 *ib.* 187; 14 *ib.* 693; 15 *ib.* 177. The record of an eviction is conclusive evidence to prove every fact established by it, against a warrantor, or any person bound to indemnify, who had notice of the pendency of the suit.—4 How. (Miss.) 246; 7 *ib.* 328; 3 Phil. Ev. 817.

CHILTON, C. J.—The principal question in this case for our decision is, whether the deed from Abernathy to Boazman, executed while Kyle, a third party, was in the adverse possession of the land, is void as between the parties to it.

That it is void as to third persons, is too well settled to be

controverted; but the counsel for the plaintiff in error insists, that it is void as between the parties, and that, if such was not the general rule, it would be void in this particular case, inasmuch as Boazman, the vendee, was the party in possession, as the tenant of Kyle, at the time the deed was made.

We have looked into the cases which bear upon this point, and we are satisfied that the weight of authority is decidedly adverse to the view taken by the counsel for the plaintiff in error.

Judge Kent, in commenting upon this point, remarks: "As the conveyance, in such a case, is a mere nullity, and has no operation, the title continues in the grantor, so as to enable him to maintain an ejectment upon it; and the void deed cannot be set up by a third person to the prejudice of his title." But he adds: "As between the parties to the deed, it might operate by way of *estoppel*, and bar the grantor. The deed is good, and passes the title as between the grantor and grantee;" and this, he says, is the language of the old authorities, even as to a deed founded on champerty or maintenance; citing Bro. Tit. Feoffments, pl. 19; Fizherbert J., in 27 Hen. VIII, fo. 23 b, 24 a; Cro. Eliz. 445; Hawk. b 1, c. 86, § 3.

The same doctrine is asserted in Jackson v. Demont, 9 Johns. Rep. 55, 60, where it is said to be a principle which runs through the books, that a feoffment upon maintenance or champerty is good as between the feoffor and feoffee, and is only void against him who hath right. The same principle was reaffirmed in Livingston v. Peru Iron Co., 9 Wend. Rep. 510, 516, where Savage, C. J., says, he considered it too well settled to admit of doubt.—See also Den v. Geiger, 4 Halstead N. J. Rep. 225, 235, where the authorities are collected. In Abercrombie v. Baldwin, 15 Ala. Rep. 371, C. J. Collier, in delivering the opinion of the court, incidentally remarks in the argument, "Such a sale, it is said, is void for all purposes, not only as against the adverse possession or title, but as between the parties themselves;" citing Williams v. Hogan, Meigs' Rep. 187. It may be observed, however, that the case referred to was a decision based on a statute of Tennessee. It is, however, needless to dwell on this point, since we had occasion to examine it at the last term of this court, in the case of Harvey v. Doe, *ex dem.* Harvey and Carlisle, 23 Ala. 637, and there held, that while the deed was void as to third parties whose right was

affected, it was valid as between the parties. It may not be amiss now to add, that the reason for avoiding the deed as to third parties, does not apply as to the parties to the conveyance.

2. The proof made by Points, that Kyle was in possession, by Boazman as his tenant, could not have affected the case in any way, and was properly excluded. Concede that both parties to the deed knew of the adverse claim of Kyle, and that there was no fraud; still, as we have seen the deed is valid *inter partes*, this does not relieve Abernathy from the liability to make good his covenants as to the title.—He assumed the burthen of extinguishing all paramount titles, so as to make that which he attempted to convey available.

Let the judgment be affirmed.

FOWLER & PROUT *vs.* ARMOUR.

1. If one contracts to serve another for one year, at a stipulated sum payable monthly, and is discharged, without any fault on his part, before the expiration of the year, he may treat the contract as still subsisting, and sue in assumpsit for wages due according to its terms, or he may consider it rescinded, and sue for unliquidated damages for its breach; if he sue on the contract, he can only recover the wages due by its terms before the institution of the suit; if for damages for breach of contract, he is entitled to recover the actual damage sustained up to the trial; but the sum specified in the contract would not, of itself, be the exact measure of such actual damage.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

ASSUMPSIT by Charles Armour against the appellants, "to recover the sum of $480 for a breach of contract, it being the sum of money agreed to be paid by said defendants to said plaintiff, for his services for one year from the 10th of May, 1852; said plaintiff having been discharged from the performance of his part of the contract." The writ was

issued on the 26th of July, 1852, and was executed on the defendants on the 3rd of September; the declaration is entitled "October Term, 1852," and the trial was had on the 21st of March, 1853. The declaration contained a special count on the contract, and the common *indebitatus* count for work and labor done. The special count sets out the contract, and avers that plaintiff entered on the discharge of his duties, but was discharged by the defendants before the expiration of the year, without any fault of his, "although he was willing, and always since has been willing to serve them," &c.; "by means whereof the said defendants became liable to pay said plaintiff said sum of forty dollars, at the end of each and every month, until the same amounted to four hundred and eighty dollars." The defendants demurred, "generally, in short, by consent," to each count in the declaration; but their demurrer being overruled, they pleaded *non assumpsit*, payment, and set-off, with leave to give any special matter in evidence.

The court charged the jury, amongst other things, "that, if they believed that plaintiff and defendants contracted together, that plaintiff should work for defendants, as engineer, for a year, and for his services as such defendants were to pay him forty dollars a month, at the end of each and every month; and if they believed that plaintiff had continued to work under the contract, until discharged by defendants, without any fault on his part, then he was entitled to recover; and the measure of damages in his favor would be, the amount of monthly wages, as specified in the contract, *done* to the end of the month next before the time of trial, although plaintiff was employed elsewhere during the whole, or any part, of the time embraced in the contract, subsequent to his discharge by the defendants, if he was, at all times, ready to perform his part of the contract, but was prevented from doing so by defendants. And, further, that it was only incumbent on plaintiff to prove that such a contract was made, his performance so long as the defendants would permit, his discharge by them without a previous fault on his part, and his readiness and willingness, at all times, to complete his part of the contract, in order to entitle him to claim from the defendants the wages according to the

contract, from the time the contract was commenced to be performed, to the expiration of the month immediately preceding the trial."

The defendants excepted to this charge; and they now assign for error the overruling of their demurrer and the charge of the court.

P. Hamilton, for appellants:

The first count alleges a special contract for one year, from May 10, 1852, at $480 per year, payable monthly; that plaintiff entered upon the performance of his contract, but was discharged by defendants, without fault on his part, "although he was willing, and always has been willing to serve them"; and concludes with a *super se assumpsit* to pay him $480, "the said sum of money." The contract thus set out is a special and entire contract.—12 Metcalf 286; 12 Johns. 165; 4 Gilman 64; 19 Johns. 337; 1 Stewart 29; Smith's Mercantile Law 427.

To entitle him to a recovery plaintiff must allege that he has fully performed the duty assumed by him, or that he was prevented from so doing by the defendant, and that he has been, during the whole time, ready and willing to perform it.—2 Pick. 267; 4 *ib.* 103; 2 Penn. R. 454. The case shows, that, even if he had been ready and willing, he could not aver it, for he had sued before the expiration of the year. He may have been willing, too, without being ready; for he may have contracted other engagements; he may have been sick, and unable to perform the work demanded; and he does not allege that he was ready.—2 Denio 609; 4 Ala. 336. Upon defendants' refusal to continue him in their employment, without fault on his part, he might at once have sued, in a *quantum meruit*, for the value of his services.—12 Vermont 625; 2 W. & S. 26; 2 Denio 609. But his action is not so framed; it is framed only to recover the sum of money contracted to be paid for the year's service. The special count, then, cannot be sustained: it was upon an entire contract, on which the whole must be recovered, or nothing at all; and at the date of the suit, or at the time of the trial, the whole period of time covered by the contract had not elapsed.

These considerations furnish a marked distinction between this case and that in 9 Ala. 292. In that case, no gross sum of money was mentioned, to mark the contract as an entire contract; that was, or might be, a severable contract; and the whole period covered by the contract had elapsed before the trial, which is not the case here: this is an action for wages, as contracted to be paid, and not for damages for a breach of contract. This precise point was hinted at in 11 Ala. 375, but was waived by the court as not arising under that declaration. It directly arises here.

An *indebitatus assumpsit* count for $480, for work and labor done, was joined with the special count. A recovery, if any, must be had on the special contract; for, such a contract being proven, no recovery can be had on the common counts, unless the contract has been rescinded, and *indebitatus assumpsit* will not lie until the expiration of the time.—12 Ala. 720, 221; 10 *ib.* 332; 15 *ib.* 735; 4 *ib.* 336; 9 B. & C. (15 E. C. L. R.) 330; 2 Murphy 248; 3 S. & R. 505; 10 *ib.* 235.

Wm. Boyles, *contra:*

Armour had a right to bring his action as soon as he was discharged.—Davis v. Ayers, 9 Ala. 293; 12 *ib.* 720. After the defendants had refused to let him perform his contract, he was not bound to stand ready to perform in all time to come: he was not obliged to aver and prove an offer to perform, with *uncore prist.*—8 Barb. S. C. R. 426, and cases there cited. Where damages are fixed by the contract, although the defendant might reduce the damages by proof, *prima facie* the plaintiff is entitled to the amount of compensation agreed on.—Webb v. Coonce, 11 Missouri R. 11.

The evidence discloses that Armour was seen after his discharge, engaged at work in another saw-mill; but there was no evidence that he was employed, or that he received compensation. The defendants are the wrong-doers; and all presumptions, as between them and the person wronged, should be made in favor of the latter, and the *onus* of proof on the former.—2 Denio 610. There is no evidence that Armour ever received one cent for his services, from the time he was discharged until the trial; therefore, the charge

on that subject was abstract, and no injury was done to the defendants.—1 Ala. 367; 8 *ib.* 828; 11 *ib.* 733. And whether correct or not, as a legal proposition, it is no ground for reversal on error.—1 Porter 139; 3 Ala. 599; 6 *ib.* 631; Reavis' Digest, p. 319, and cases there cited.

PHELAN, J.—The first count in the declaration is a good count on a special contract for wages, and with the liberal indulgence shown to declarations under our laws and rules of practice, we might be even disposed to hold it good as a count for breach of the contract, if that were necessary to sustain the judgment below.—Davis v. Ayers, 9 Ala. 292.

But, whether the action is to be treated as one for damages arising from a breach of the special contract, alleged and proven, or for wages due according to contract, the charge of the court we conceive to be erroneous.

The proof shows, that Armour engaged with the plaintiffs in error to serve them for one year from the 10th May, 1852, at $40 a month, payable monthly, as an engineer at their saw-mill. Armour served a few months, and was then taken sick, and was absent for a time. When he returned and offered to continue his services, the plaintiffs in error refused to permit him to continue them any longer. He then brought this action, and the writ was executed 3rd of September, 1852. The trial below took place 21st of March, 1853.

The conduct of plaintiffs in error, if they refused, as he avers, to permit him to continue his services as engineer, without fault on his part, left open to Armour two modes of redress by suit: he could either treat the contract as rescinded, and sue immediately for a breach of the contract; or he might treat the contract as still subsisting, and bring his action for the wages due him according to the contract.

If he had sued for breach of the contract as upon a rescission, his action would necessarily be for unliquidated damages. He would be entitled to recover the actual damage he had sustained by breach of the contract on the part of the plaintiffs in error, in refusing to permit him to go on with his services; and in that case he would be allowed to prove

any such actual damage—the natural and proximate consequence of such breach—as had sprung up or developed itself up to the time of the trial.—Davis v. Ayers, 9 Ala. 292; 4 Peters 172.

But in such case, the amount of wages for which he had stipulated would not be the measure of damages. His actual damage, all the circumstances considered, whether more or less than that, would be the true measure of the amount which he would be entitled to recover. The amount of wages for which he had stipulated might very properly be taken into consideration by the jury, to aid them in forming a correct estimate of the actual damage he had sustained, but would not be, of itself, the exact measure of such actual damage.

If, on the other hand, he sued for the wages due according to the contract, his action would, of course, be one for liquidated damages. If entitled to recover at all, it must be, not for the breach of a contract which, on account of the unlawful act ef the other party, he treats as no longer subsisting between them, but for the breach of the stipulations of a contract which he treats as still subsisting. If, then, he recovers in such an action, it must be his wages, the specific sum agreed to be paid for his services; and, moreover, if the suit is on the contract for the wages due according to its terms, the wages must be due and payable, in fact, before any action for them can lawfully be commenced: that is, Armour must have either done the service, or have been ready and willing to do it, for the whole time for which he brings suit. Under this contract, he could have brought suit at the end of every month, or of three, five, or any other number of months, the wages being expressly made payable monthly.—Davis v. Preston, 6 Ala. 83; 10 Johns. 203.

Now, under the first aspect of the case, that is, supposing the action to be for the breach of a rescinded contract, the charge of the court is erroneous; because the jury are instructed' "if they believe," &c., "then he (Armour) was entitled to recover; and the measure of damages in his favor would be, the amount of monthly wages, as specified in the contract, down to the end of the month next before the trial of the cause." The amount of wages agreed to be paid by

the terms of the contract, as we have shown, would not be the true measure of the actual damage resulting in such case; and that alone is the true measure, when the action is for a breach of the contract which one party treats as no longer subsisting, on account of the refusal of the other party to perform his stipulations.

But, if the action is to be regarded as one founded on the contract as still subsisting, the charge of the court is erroneous; for, in the face of the pleadings, and the proof, showing that the contract was entered into 10th of May, 1852, the writ executed 3rd of September, 1852, and that the trial took place 21st of March, 1853, the jury are instructed, "if they believe," &c., then the plaintiff was "entitled to claim from the defendants the wages according to the contract, from the time the contract was commenced to be performed, to the expiration of the month immediately preceding the trial." This would be allowing a man to sue for and recover wages before his wages were due—before he had either performed his work, or offered to perform it according to his contract; which is contrary to well settled principles. The distinction is this: If the action be for breach of a contract still subsisting, and for liquidated damages, the action cannot be properly brought, until the sum is due and payable by the terms of the contract, and the plaintiff cannot recover more than is due at the time of suit brought; but, if one party commits such a breach of the contract, that the other party is for that reason at liberty to treat it as rescinded, and does so, he may sue for such breach of the contract immediately; and his recovery, in the latter case, will be such actual damage as he can show to have been the natural and proximate consequence of the act of the other party, up to the time of the trial.—9 Ala. 292; 11 *ib.* 375; 2 Green. Ev. §§ 253, *et seq.;* 6 Ala. 83; 10 Johns. 203.

The judgment is reversed, and the cause remanded.

GIBSON *vs.* HATCHETT & BROTHER.

1. A witness may state that an aperture in a wall was visible from a certain point.
2. A building having been consumed by fire, which entered through an aperture in one of the walls, a witness cannot state that the house might have been saved if the aperture had been closed.
3. In *assumpsit* to recover for advances made on cotton, which was destroyed by fire while stored in plaintiff's warehouse, the defence was, that defendant was entitled to recoup for its loss; and there was evidence tending to show that plaintiff had contracted to store the cotton in a fire-proof warehouse: *Held*, that any evidence, however slight, which tended to show defendant's assent to the storing of his cotton in a house not fire-proof, was relevant and admissible for the plaintiff; and the fact that a certain aperture in the wall, through which the fire entered, was visible to the defendant, when he had once entered and examined the warehouse after his cotton had been stored, was relevant for this purpose.
4. A witness having been asked, whether, if plaintiff's warehouse had been as good as his own, it could have been saved by the use of ordinary diligence, answered, "Had it been as good as mine, eight such men could have saved it, but Major Dick was one:" *Held*, that the latter clause of the answer was not responsive to the interrogatory.
5. When a general objection is made to an entire answer, a portion of which only is objectionable, it is not error to sustain the objection and exclude the whole answer.
6. Defendant may show in what manner a certain other warehouse "was built, that it was not burned, and the special efforts by which it was saved," if he first proves that it was fire-proof, and was exposed to the same damage as plaintiff's; but without this preliminary proof such evidence is inadmissible.
7. The erroneous exclusion of redundant evidence, is not available on error, as no injury results from it.
8. A want of ordinary care in one particular, on the part of a warehouse-man, does not render him responsible for a loss occasioned by other causes not connected with that particular.

ERROR to the Circuit Court of Coosa.

Tried before the Hon. JOHN D. PHELAN.

ASSUMPSIT by Hatcher & Brother against Allen Gibson, to recover for advances made on cotton, which had been destroyed by fire while stored in plaintiffs' warehouse. The defence was, that the cotton was destroyed under such circumstances as authorized the defendant to recoup the damages.—See 13 Ala. 589.

The evidence tended to prove that the plaintiffs had contracted to store the cotton in a fire-proof warehouse, and that one hundred and six bales were destroyed by fire after being stored. A witness for the defendant, having stated on cross examination that, after the cotton had been stored, the defendant visited the warehouse, and examined it, was asked, whether the defendant could not have seen a certain opening in the wall of the house from the place where he stood, about one hundred and sixty feet distant. The defendant objected to this question, because it called for the opinion of the witness; but the court overruled the objection, and defendant excepted.

The defendant read in evidence the deposition of William F. Thomas, who was asked, among other things, this question: "Was the Hatchett warehouse equal, or inferior, to the one occupied by yourself at that time? If it had been as good, could it have been saved by the use of ordinary diligence?" He answered: "Plaintiffs' warehouse was not equal to mine, but inferior. Had it been equal, eight such men could have saved it, but Major Dick was one." The plaintiffs objected to this answer, and their objection was sustained; to which defendant excepted.

The defendant offered to prove, by a witness who was acquainted with the warehouse of said Thomas, "in what manner the warehouse of said Thomas was built, that it was not burned, and the special efforts by which it was saved;" but the court excluded this evidence, on plaintiffs' objection, and defendant excepted.

The defendant, having proved that the fire entered the plaintiffs' warehouse through the aforesaid opening in the wall, "offered to prove, by the opinion of witness, that the house and cotton could have been saved, if this space had been built up." The plaintiffs objected to this evidence, and their objection was sustained; to which the defendant excepted.

The defendant then offered to read in evidence the following statement of Joseph F. Bradford, which it was agreed should be received as his deposition: "In conversation with W. T. Hatchett, after I had seen his advertisement stating his warehouse to be fire-proof, I asked him, if it was fire-proof. He stated, he was going to have it fire-proof, or as much so as he could, before he stopped working on it. I then told him, I would

not run the risk for the storage he was charging, for I believed his advertisement amounted to an insurance against fire. This conversation took place in the fall of 1844, as well as I now recollect." The defendant offered this evidence together, as it is above set out; the plaintiffs objected, and the court sustained the objection; to which the defendant excepted. The defendant then offered the above statement, leaving out the words "I then told him, I would not run the risk for the storage he was charging, for I believed his advertisement amounted to an insurance against fire," for the purpose of showing plaintiff's continued intention to make his warehouse fire-proof, and to rebut the idea that he had abandoned this intention. The plaintiff again objected, and the court sustained their objection; and the defendant excepted. Defendant did not, at any time, state that he "expected to connect said statement, in whole or in part, with any other proof."

"There was evidence conducing to show, that defendant had waived his right, agreeably to the stipulations of the plaintiffs, to have his cotton stored in a fire-proof warehouse, and was content to put up with the warehouse in the condition in which it was proved to be at the time it was burned."

The counsel for the defendant requested the court to charge, "that it was not consistent with ordinary care and diligence to store gunpowder in a cotton warehouse; and that, if the jury should believe that no prudent man would do such a thing with his own cotton, and plaintiffs did so with defendant's cotton, they must find for defendant." The court refused this charge, and the defendant excepted.

The several rulings of the court above set forth, are now assigned for error.

White & Parsons, Elmore & Yancey, and S. F. Rice, for plaintiff in error:

1. Instead of allowing the opinion of the witness, as evidence of the fact that Gibson "could see the open space in the side wall," the court should have required him to state the facts, without which no conclusion could be arrived at by any one, viz., the distance, the relative position of the two points, whether there was, at that time, anything to obstruct his vision between the two points. The great objection to evidence of this

kind is, that it substitutes the witness for the jury.—Johnson v. The State, 17 Ala. R. 623; M. & W. P. Railroad Co. v. Varner, 19 *ib.* 186; 3 Stark. Ev. 1736; Bullock v. Wilson, 5 Porter 338; Robertson v. Stark, 15 New Hamp. 109. The question, too, called for irrelevant matter: Gibson was under no obligation to ascertain whether the house was fire-proof.—Hatchett & Bro. v. Gibson, 13 Ala. 589.

2. The witness, Thomas, was a master builder, and therefore an expert; and this renders his opinion competent evidence. His answer to the ninth interrogatory was responsive, and contained competent evidence; it should, therefore, have been admitted.—Litchfield v. Falconer, 2 Ala. 280; Donnell v. Jones, 13 Ala. 490; Borland v. Walker, 7 Ala. 269. It was not opinion merely, but something more.—Baldwin v. The State, 12 Missouri R. 238; Head v. Shaver, 9 Ala. 791. That the answer was relevant, see Hatchett v. Gibson, 13 Ala. R. 597. The opinion was called for without objection; the failure to object when the cross interrogatories were filed, was a waiver of the objection; the objection was too general, and was not urged. Milton v. Rowland, 11 Ala. 738.

3. The refusal of the court to allow the defendant to prove in what manner the warehouse of Thomas was built, that it was not burned, and the special efforts made to save it, was in direct conflict with the decision of this court when the case was here before.—Hatchett v. Gibson, 13 Ala. 598. The testimony of Darby, showing that Thomas' warehouse was fire-proof, was before the court when this evidence was rejected. The record now presents the exact state of facts on which this court held this identical evidence admissible. That decision is the law of this case, even if erroneous.

4. If the opinion of the witness Darby is admissible, to prove that Gibson "could see the open space in the wall," then his opinion is also admissible, to prove that, "if the open space had been built up, the house and cotton could have been saved."

5. It has already been decided, in this very case, that Hatchett's declarations to Bradford, as to his intention to make his warehouse fire-proof, were admissible.—Hatchett v. Gibson, 13 Ala. 599. We think it also allowable, as tending to show notice to Hatchett of the insecurity of his house, to prove what Bradford said to him.

6. It is admitted, that warehouse-men are only bound to use reasonable and common care; but it is insisted, that storing gunpowder in a cotton warehouse, is evidence of gross negligence.—Chenowith v. Dickinson, 8 B. Monroe 156; Story on Bailments, § 409, and authorities there cited.

JOHN T. MORGAN and MARTIN & BALDWIN, *contra*:

1. There was no error in allowing the witness to testify that the defendant could have seen the open space in the wall: this is not stating an opinion, but a fact. How else could this fact be proved?—Chenault v. Walker, 14 Ala. R. 134; Massey v. Walker, 10 *ib.* 290.

2. The latter part of the answer to the ninth interrogatory was not responsive to the question, and it was therefore properly rejected. A general objection may, it is true, be overruled, if a part of the answer is unobjectionable; but the objection may likewise be sustained.—Melton v. Troutman, 15 Ala. 537; Smith v. Zaner, 4 *ib.* 99; Elliott v. Pearsall, 1 Peters 328.

3. The witness, Thomas, who testified that his warehouse was fire-proof, was introduced after Williams, by whom defendant had offered to prove "in what manner Thomas' ware-house was built, that it was not burned, and the special efforts by which it was saved." This testimony, when it was offered, was irrelevant, and was, for that reason, properly ruled out. But, if this was erroneous, it was error without injury; for defendant afterwards proved by Thomas all that he had sought to prove by Williams.—Herbert v. Hanrick, 16 Ala.; Parsons v. Boyd, 20 *ib.* 121; Dye v. Easley, 14 *ib.* 162; Bohannon v. Chapman, 17 *ib.* 696; Bradford v. Bush, 15 *ib.* 317.

4. The opinion of the witness, "that the house and cotton could have been saved, if the space in the wall had been built up," was properly excluded: the evidence was the mere opinion of the witness, in a matter in which he was not an expert.

5. The written statement of Bradford was properly excluded by the court. His testimony was different from what it was at the former trial; and, therefore, what the court then said of it, is not now the law of the case. Besides, the record shows that it was offered for an entirely different purpose from that for which the court then said it was admissible.—Walker v. Blassingame, 17 Ala. 812; Creagh v. Savage, 9 *ib.* 959.

6. There was no error in refusing the charge asked. What is ordinary care and diligence is a matter of fact, depending much upon where they are to be exercised; and there was no proof upon the point in this case.

GOLDTHWAITE, J.—An objection was taken in the court below to an inquiry made of a witness, as to whether the defendant could see an opening in the wall from the place where he was proved to have been standing. This objection was overruled, and the witness allowed to answer the question. It was through this aperture in the wall, that the fire which consumed the building entered; and the defendant offered to prove, by the opinion of a witness, that the house and cotton could have been saved, if this opening had been built up. This evidence was rejected. We shall consider the ruling of the court in relation to this testimony, except as to the relevancy of the first piece of evidence, as constituting but one question.

The general rule is conceded, that a witness must testify as to facts, and facts only; but to this rule there are several well established exceptions, and it is often extremely difficult to define the line which separates opinion from fact. Evidence as to personal identity,—the value of property, and hand-writing, must always, to a certain extent, be matter of opinion; and yet, in these cases, the witness is allowed to state his conclusions.—1 Greenl. Ev. § 440; so, also, as to time, and distance. The question propounded to the witness we regard, in substance, as simply whether an object was visible from a certain point, and are inclined to consider it as a matter of fact, rather than of opinion. There is no inference to be drawn—no circumstances to be weighed. It depends upon the exercise of a physical sense. But, if it were matter of opinion, we should hold it admissible, upon the principle which obtains in the other instances we have referred to.

It is obvious, however, that the testimony which was rejected, does not rest upon the same principle. The question as to whether the building could have been saved, if the opening referred to had been built up, does not depend upon the simple exercise of a physical sense: it requires the aid of the intellectual powers; there are, in that case, inferences to be drawn, and circumstances to be weighed, which it is peculiarly the pro-

vince of the jury to do. It is entirely matter of opinion, and there is no principle on which it can be excluded from the operation of the general rule of law.

As to the relevancy of the first question, we consider it as decided when the case was last here.—13 Ala. 589. Gibson, it is true, was under no obligation to ascertain whether the building was fire-proof; but it was competent for him, in the language of Collier, C. J., "by his acts, to assent to the storing of his cotton in a building of a different description from what the plaintiffs' contract contemplated;" and any testimony, however slight, which tended to establish this conclusion, was admissible. In this aspect, the evidence was relevant.

We think, also, there was no error in overruling the objection to the answer to the ninth interrogatory, the latter portion of which was objectionable, for the reason that it was not responsive. The inquiry is, "If the warehouse had been as good as that of the witness, could it have been saved by the use of ordinary diligence?" The reply is, "Had it been as good as mine, eight such men could have saved it, but Major Dick was one." We suppose the witness must have referred to the fact of the number of men engaged in saving his own warehouse on the night of the fire, or to those who were engaged in assisting Hatchett that night; and interpreting his answer by reference to these facts, it can only mean that, if Hatchett's warehouse had been equal to his own, it could have been saved by eight men, if Major Dick was one. Admitting, for the sake of argument, that any valid objection to the question had been waived, as is contended on the part of the plaintiff in error, we are still unable, upon the only rational interpretation we can put upon the portion of the answer to which we have referred, to perceive that it is responsive to the interrogatory. It assumes, that eight "such hands" as were engaged in rendering assistance, either to Hatchett or the witness, during the fire, could, by the use of ordinary diligence, have saved the warehouse, provided the particular individual to whom he refers by name had been one of them. This, by itself, and without further explanation, was no answer to the inquiry; and if admitted, without explanation, might serve to mislead the jury. It is true, that a portion only of the answer was, upon the grounds on which we have considered it, objectionable, while the objec-

tion went to the whole; and we have frequently held, that in such case it does not devolve upon the court to separate the legal from the illegal evidence, but that the whole may be admitted, (Murrah v. The Br. Bank, 20 Ala. 392, and cases there cited); and upon the same principle, where any portion is illegal, the whole may be excluded.

In relation to the offer made on the part of the defendant below, "to show in what manner the warehouse of Thomas was built,—that it was not burned, and the special efforts which were made to save it:" This evidence would have been proper, if it had been shown that the building of Thomas was fire-proof, and as much exposed to danger as Hatchett's warehouse.—Collier, C. J., in holding that this evidence was admissible, in the opinion we have already referred to, rests it upon the first ground; and we have looked into the record in that case, and find that both of these facts were in evidence. Indeed, it is obvious that, unless they were established, evidence showing the same facts, in relation to any other building, would have been equally relevant. To have rendered this evidence legally admissible, the facts upon which its relevancy depended should have been proved, or it should have been offered in connection with these. This was not done; and without it there was no error in rejecting the testimony.

So, also, as to the rejection of the declarations made by Hatchett to Bradford, in the fall of 1844, to the effect that he intended to make his warehouse fire-proof before he stopped working on it. It was held, it is true, when the case was last before this court, that these declarations were properly admissible, for the purpose of fortifying the inferences resulting from the advertisements and form of the receipts given by the plaintiff for cotton (13 Ala. 589); but in the present case, the record shows that they were not offered with that view, but for the purpose of showing "the continued intention of the plaintiff to make his warehouse fire-proof, and to rebut the idea that he had abandoned this intention;" and conceding that the declarations may have tended to establish these facts, we are unable to perceive their relevancy to the issues. That Hatchett intended before, and in the fall of 1844, to make his warehouse fire-proof, certainly does not tend to show a contract on his part to store in a warehouse of that description, or to rebut any

testimony which had been offered to prove that this contract, if it existed, had been modified or changed by the parties. But had it been offered for the identical purpose for which it was decided by this court to have been admissible, the error in its rejection would not have been available here, as the charge of the court was, that the contract to store in a fire-proof warehouse was established without the aid of such facts, and the evidence thus considered was redundant and superfluous, the exclusion of which, although erroneous, is not available, as no injury results from it.

There was no error in the refusal of the court to instruct the jury as requested; for the reason, that the charge asked asserts the proposition, that the want of ordinary care in a certain particular, will render the bailee responsible in all events. Without deciding the question, whether the keeping of gunpowder in a cotton warehouse was a want of ordinary care in Hatchett, it is certain, that, if the destruction of the cotton was not connected with that act, but was owing to other causes, the bailee could not be held responsible on that ground.

It results from the views we have expressed, that there is no error in the record, and the judgment is affirmed.

CHILTON, C. J., not sitting.

MILLARD'S ADM'RS *vs.* HALL.

1. The retention of possession by the vendor of a chattel, if unexplained, is only *prima facie* evidence of fraud, as against creditors, and may be explained; and if the transaction is *bona fide* throughout, and such retention of possession is consistent with good faith and the absolute disposition of the property, the title passes by the contract of sale.
2. An absolute bill of sale of a slave is not required to be recorded, although there is a contemporaneous agreement for the delivery of the slave at a future day.
3. When the facts in evidence show a sufficient explanation of the vendor's retention of possession, the party alleging fraud cannot complain on error

that the court referred to the jury the question of their sufficiency. As to what is a sufficient explanation of the vendor's retention of possession.

4. Where slaves are attached, and sold under an order of court as "perishable property," the sale is sufficient to pass the title to the purchaser [LIGON, J., *dissenting*).

5. An order of court directing the sheriff to "proceed to sell" certain property in his hands, which he had attached, and "pay the proceeds into court," is a sufficient authority to him to make the sale, without any process or copy of the order from the clerk.

6. An agreement, of record, that the testimony of a witness "shall be considered as regularly taken," does not prevent an objection to any portion of it containing illegal evidence.

7. To authorize the admission of secondary evidence of the contents of an order of sale made by the court, its existence should be first proved, and its absence accounted for, or its loss established, after the requisite searches had been made for it in the proper office.

ERROR to the Circuit Court of Autauga.

Tried before the Hon. ANDREW B. MOORE.

DETINUE by the plaintiffs in error, as administrators of Nathaniel M. Dillard, deceased, against William T. Hall, for a slave named Big George, alleged to be the property of the plaintiffs' intestate.

On the trial a bill of exceptions was allowed, from which it appears that the plaintiffs claimed title to the negro in the following manner: The plaintiffs introduced the record of a judgment from Mississippi, showing that one Greene, on the 18th day of March, 1848, recovered a judgment against one Thomas Hall, for the sum of about $10,000. The said Greene, on or about the 29th day of March, 1848, commenced an attachment suit against the said Hall, in Dallas County, Alabama, founded upon his Mississippi judgment; and under the said attachment the negro in question was levied on, and sold as perishable property, by order of the judge of the Circuit Court of Dallas. The record of the attachment suit in Dallas is made an exhibit to the bill of exceptions, and in it appears the order for the sale of the property levied on as perishable; but the record does not show any process, issued by the clerk of the court in which said attachment was pending, for the sale of the property. The plaintiffs proved, that after the making of the order to sell the property levied on as perishable, the sheriff of Dallas sold the

same, and at such sale Messrs. Bliss & Jones became the purchasers of said negro, and conveyed him to one Abnér Jones, who sold and conveyed him to the plaintiffs' intestate.

The defendant claimed title by bill of sale from Thomas Hall directly to himself, which is as follows: "Received of William T. Hall nineteen hundred and fifty dollars, in full purchase money for four negroes, to-wit: Big George, a man twenty seven years of age, Reuben, a man twenty-three years of age, Avis, a woman twenty-five years of age, Kinchen, a boy twelve years old; and also two mules, one dark mule nine or ten years old, called by the name of Kit, one bay named Pet; which negroes and mules I will warrant the titles good against any claim or claims whatsoever, this the 8th day of March, 1848.

Signed in presence of } [Signed] THOMAS H. HALL.
J. C. WRAY. }

N. B. The above named negroes and mules are to be delivered up to William T. Hall on the 1st day of December next. this the 8th day of March, 1848.

Test: } [Signed] THOMAS H. HALL.
J. C. WRAY. }

The plaintiffs showed, that their intestate had possession of the negro, and took such possession with the conveyance of the title from the said Abner Jones; that he held said slave for some time, when the defendant got possession of him, and had held said possession until the commencement of this suit, and to the present time. The plaintiffs introduced evidence tending to show, that Thomas H. Hall had, for a number of years before 1848, been the owner of the slaves levied on, and amongst others the one in question; that he resided in Alabama a number of years, but in 1845 removed to Mississippi, where his negroes, more than twenty in number, remained until the latter part of December, 1847, when they were secretly removed back to Autauga County, Alabama; after said negroes arrived in Alabama, they were placed by Thomas H. Hall on a plantation in Autauga, where he had prepared to make a crop, and during the month of March, 1848, had planted some; that about the latter part of March, 1848, the said Thomas H. received information from Mississippi that Greene had recovered a judgment against him for $10,000, and that said Greene had an agent in Alabama, and in Autauga County, with a view

of taking legal steps to make the money on said judgment; that as soon as the said Thomas H. acquired the above stated information, he started his overseer, in the night time, with ten negroes, which were afterwards levied on in Dallas, and of which the negro in question was one, instructing him to go to Louisiana, or somewhere west, and do the best he could for him with them. Whilst these negroes were passing through Dallas, in flight, they were seized and levied on in the attachment suit above named. It was shown that no person claimed said negroes when levied on in the manner aforesaid, and that the said Thomas H. had sent them off expressly to get them beyond the reach of Greene's judgment or attachment.

The depositions of one Lovett, and of one Lapsley, were introduced, certain portions of which referring to the contents of the order of sale issued by the clerk of the Circuit Court, were excluded by the court; to this the plaintiffs excepted. The witness Lovett uses the following language: "The order for selling the negroes was in writing, issued by the clerk of the Circuit Court, and came to the hands of the sheriff in the usual manner. After the sale the order was returned to the office of the circuit clerk; witness is informed that there is a transcript sent up from the clerk's office of the Circuit Court of Dallas, to be used in evidence on the trial of this case, in which the order inquired of appears, and therefore supposes it is unnecessary for him to attach a copy as requested in this interrogatory."

The defendant, in order to strengthen his title, based as it was on the bill of sale from Thomas H. Hall, as above stated, offered evidence tending to show, that before the date of said bill of sale, the said Thos. H. Hall was indebted to him in a sum more than $2,000. The testimony showed, that there was no delivery of possession of said slaves named in the bill of sale to said William T. Hall, but that they remained in the possession of the said Thomas Hall, under an agreement made at the time of the sale. The testimony tended to show, that Thomas H. Hall had given his note for the reasonable hire of said slaves, during that year, to the first of December; but there was no proof that said hire, or any part thereof, had ever been paid by said Thomas H. to said William T.

The additional clause to the bill of sale was proved to have

been made at the same time with the main body of it, and formed part and parcel of the same transaction. There was no proof that said bill of sale was ever recorded, or that any effort was ever made to record it. It was further shown, that Thomas H. Hall and William T. Hall were brothers. The testimony also tended to show, that the said William T. Hall knew of the levy of the attachment on the property, a few days after the same was made. There was no evidence tending to show that Greene, or the purchasers at sheriff's sale, had any notice of the claim of William T. Hall. The testimony tended, further, to show that Thomas H. Hall was indebted also as surety for Dixon Hall before March in 1848, and that early in that month the balance of his negroes had been levied on under an execution from Macon County, and were afterwards all sold; that the negroes, after the sale to William T. Hall, by the bill of sale above set forth, were permitted to remain with the said Thomas H., under the contract for hire, to enable him to make his crop for that year.

Upon this evidence, the plaintiffs asked the court to charge the jury:

1. That, if they find from the evidence that there was a private sale of negroes by Thomas Hall to William T. Hall, on the 8th of March, 1848, and there was no actual delivery of the property, and the property was permitted to remain in the possession of Thomas H., and the creditor, Greene, afterwards levied on the property, whilst in the possession of the said Thos. H., without any notice of the sale to William T., and said property was afterwards sold under the levy, and purchased without notice of William T. Hall's claim, then the right of such purchaser at sheriff's sale would be better than that of William T. Hall; which charge the court refused to give, without this qualification: that if the possession of Thomas Hall, after the bill of sale to William T. Hall, was satisfactorily explained, William T. Hall's right, if his purchase was *bona fide*, would be better than those of the purchasers at sheriff's sale; to which refusal to charge, and to the qualification as given, the plaintiff excepted.

2. That the bill of sale, with the addition thereto, being on the same day, and a part of the same transaction, containing a reservation to the grantor, should have been recorded as required

by the statute, and, if not recorded within the time prescribed by law, would be void as to creditors and purchasers without notice, unless the possession of the property had been changed; which charge the court refused to give, and the plaintiffs excepted.

2. That the continuance of the possession of the property by Thomas Hall, after the sale to William, was not sufficiently explained by the facts proven in relation thereto, if the sale was a private one.

4. That the retention of possession of the property, after the sale by Thomas Hall, is not sufficiently explained by the postscript or addition to the bill of sale, stipulating for the delivery of the property at a future time, if the sale was a private one, nor by the fact that the vendor, having prepared his lands for a full crop, desired to retain the negroes, to aid in planting and cultivating the crop, although there was a private agreement to pay hire for the negroes, which was not paid. The court refused to give these charges, on the ground that he was unwilling to instruct the jury as to what was or was not a sufficient explanation of the circumstances of the possession by the vendor, the court preferring to leave that question to the jury; to which refusal to charge, the plaintiffs excepted.

5. The plaintiffs further asked the court to charge, that there was a sufficient order to authorize the sheriff to sell the property levied on under the attachment, and that the sheriff was authorized to sell under the order of the Circuit Court, as set forth in the record from the Circuit Court of Dallas, without any further order or process. This charge the court refused, and charged the jury, that the order of the Circuit Court, without further order or process issued thereon by the clerk, was not sufficient authority to the sheriff of Dallas to sell the property, and that the record from Dallas showed no sufficient authority; that, if the sheriff proceeded to sell under the order of the Circuit Court, as set forth in the record from Dallas, without any other process or order, then the sale was void, and the purchaser at such sale got no title; to which refusal to charge as asked, and to the charge as given, the plaintiffs excepted.

The plaintiffs thereupon took a non-suit, and a bill of exceptions to the several rulings against them; and they now assign for error these several rulings of the court below.

WATTS, JUDGE & JACKSON, for plaintiffs in error :

I. 1. An attaching creditor is to be considered as a purchaser.—Coffin v. Ray, 1 Metcalf 212, which is cited with approbation in the case of Ohio Ins. Co. v. Ledyard, 8 Ala. 873 ; also, Shumway v. Rutter, 7 Pick. 56, and the authorities cited by Merrick for defendant.

2. The attaching creditor's rights are superior to those of a secret purchaser, who permits the property to remain in the vendor's possession, unless the attaching creditor had notice of the sale, either actual or constructive, before he acquired a lien by his levy.—7 Pick. 56 ; 17 Mass. 110 ; 1 Metcalf 212.—The New Hampshire and Connecticut cases, cited by the counsel for defendant in error, maintain this principle to the fullest extent, and simply say that there was a wrong application of the principle. All these authorities show, that there must be an actual delivery, when it is practicable.

3. In this case, both Wm. T. Hall and Greene were creditors of Thomas Hall ; and he who is most diligent and is least in fault, has the superior right. Now the former, after taking his bill of sale, chose to let Thomas Hall keep possessiou until Greene attached. Greene had no notice of Hall's purchase, and nothing to put him on inquiry : it was a private sale. and the possession remained unchanged. Nor did the purchaser under the attachment have any notice whatever of William T. Hall's rights, nor was there anything to put him on inquiry : on the other hand, all the facts tended to show to them that Thomas Hall had been, and continued to be, the owner of the property; his possession was the same ; the negroes were in flight, running away secretly, at the instance and request of Thomas Hall ; no claim to the property was interposed by William T. Hall ; his interest was not made known on the day of sale, although he knew of it, and was fully informed of the levy and flight of the negroes.

II. The bill of sale, and the postscript to it, if they are to be regarded as one instrument, reserved an interest to the grantor, and are not good, as against an attaching creditor, or a purchaser without notice. Either actual or constructive notice must have appeared. The deed should have been recorded.

III. 1. But if it was not required to be recorded, then, we insist, the charge asked ought to have been given. The facts

and circumstances did not furnish a sufficient explanation of the vendor's retention of possession after the bill of sale.—Borland v. Planters & Merchants' Bank, 5 Ala. 531, and the long list of authorities there cited.

2. The court erred in refusing to charge the jury as to what was a sufficient explanation of the retention of possession. The facts being ascertained, this was purely a question of law, and the court was bound to charge the jury what was the law.—See Borland v. P. & M. Bank, *supra*, and numerous other cases, mataining that whenever the facts are ascertained, the question is one of law, and not of fact.

IV. As to the charge and refusal to charge, as to the order of the Circuit Court furnishing authority to the sheriff to sell: The order was ample and complete authority, and the sale under it was confirmed by the court in its judgment entry.—Clay's Digest, p. 56, § 8. But if the issuance of a copy of the order by the clerk would have been regular, the sale without the issue of such a copy would be, at most, merely voidable, not void, and the purchaser's title would be valid.—Ware v. Bradford, 2 Ala. 676; 5 *ib.* 58; 6 *ib.* 234; 4 *ib.* 402; Hubbert v. McCollum, 13 *ib.* 282; Cogburn v. Spence, 15 *ib.* 549; Pollard v. Cocke, 19 *ib.* 193; Weir v. Clayton, 19 *ib.* 132.

V. The testimony of Lapsley and Lovett ought not to have been excluded. The agreement of counsel, entered of record, which was given after the testimony was taken, authorized its admission, and the court had no authority to set aside the agreement. But the court did not, in fact, set aside the agreement, but simply construed it in such a way as to exclude the testimony; and in this construction we say the court erred.

N. Harris, *contra*:

1. The conveyance of the negroes, and the promise to deliver them on the first of December written under it, being made at the same time, constitute but one agreement.—Sewall v. Henry, 9 Ala. 24.

2. By the terms of the agreement, the property was to remain in the vendor's possession until the first of December following the sale, under a promise from him to pay hire. His possession, therefore, was consistent with the agreement, and was not a badge of fraud.—Hopkins v. Scott, 20 Ala. 184;

Magee v. Carpenter, 4 *ib.* 474; Ravisies v. Alston, 5 *ib.* 303; Dubose v. Dubose, 7 *ib.* 235; Desha, Shepard & Co. v. Scales, 6 *ib.* 360; Ayers v. Moore, 2 Stew. 343; Henderson v. Mabry, 13 *ib.* 718; Mauldin & Terrell v. Mitchell, 14 *ib.* 819; Cowper 432; Holmes v. Crane, 2 Pick. 610; 3 *ib.* 257; Long on Sales, pp. 112, 113, 279.

3. The conveyance from Thomas Hall to William was not such a conveyance as the law requires to be recorded: it was upon a consideration deemed valuable in law. The only conveyances of personal property required by our registry acts to be recorded, are: first, conveyances on consideration not deemed valuable in law, where the possession shall not remain with the donee; second, loans, declarations of uses, &c., when possession shall have remained with the loanee for the term of three years; third, deeds and conveyances of personal property in trust to secure any debt or debts.—Clay's Digest, p. 285, §§ 2 and 5.

4. If the agreement to deliver the slaves on the first of December cannot be considered a part of the original contract of sale, then, if the sale and hiring were *bona fide*, and on a sufficient valuable consideration, such hiring is a sufficient explanation of the retention of possession by the vendor.—Hobbs v. Bibb, 2 Stew. 57; 2. Pick. 610; 3 *ib.* 257.

5. If the retention of possession by the vendor was consistent with the terms of the sale; or, if the sale and hiring were *bona fide*, and on sufficient consideration: in either case, the court properly refused to give the third and fourth charges asked by plaintiffs in error, because both of them excluded from the consideration of the jury the *bona fides* of the sale and hiring—facts which were material to the defendant's title.—Nabors v. Camp, 14 Ala. 464; Carlisle v. Hill, 16 *ib.* 406.

6. The declaration of the presiding judge, "that he was unwilling to instruct the jury, as to what was, or was not, a sufficient explanation," &c., was not a charge: it was simply assigning a reason for refusing to give the charges asked; and, even if the opinion was erroneous, it was no ground for reversal. Green v. Tims, 16 Ala. 541; Phillips v. Beene, 16 *ib.* 720; 8 Porter 142. It is the province of the jury to determine whether the explanation is sufficient.—Henderson v. Mabry, 13 Ala. 715; 9 Conn. 216.

7. The sheriff, being a mere ministerial officer, has not authority to act, in any civil matter, unless some precept or warrant, issued by lawful authority, is placed in his hands, commanding him to do the required act: he cannot act officially, in any civil matter, without process.—8 Bacon's Abr., p. 694, and cases cited; Hall v. Roche, 8 Term R. 187. The statute under which the order of sale purports to have been granted, requires, by necessary implication, that the order of sale, or some process, shall be placed in the sheriff's hands; otherwise, how could he be sued for failing to return it?—Clay's Digest, p. 56, § 8.

8. The order of sale was a nullity, because the facts which authorize a sale of property seized under attachment were not shown to have existed. The seventh and eighth sections of the law relating to attachments, found in Clay's Digest, p. 56, are the only statutes applicable to the case; and unless they confer authority upon the circuit judges to order a sale of slaves as "perishable property," the authority does not exist. The seventh section declares the nature of the property which may be sold, and the eighth declares the evidence upon which the order of sale may be made, and the proceedings of the officer under the order. It cannot be insisted, that the words "clearly of a wasting or perishable nature," in their common acceptation, include slaves; and the rule of construction is, that words which are not technical, when used in statutes, are to be understood in their common acceptation. It is evident that the statute was not intended to embrace every species of personal property; for, if such had been the intention, fit and proper language would have been used. The property must not only be personal, but "clearly of a perishable nature" or "likely to waste, or be destroyed by keeping." Slaves are regarded by our laws as the highest species of personal property, and are even invested with some of the attributes of realty; and such is the policy of the law in the other slave-holding States. As to what "perishable property" is, see 1 Bouv. Law Dict., "*Bona Peritura*," p. 200, (2d ed). If lands were sold under such an order as "perishable property," the order would clearly be a nullity, and the purchaser would take no title; and the same result must follow, if an order was made, under similar circumstances, for the sale of any property not "clearly of a wasting or perishable nature."

9. If the order of sale was a nullity, then no title passed by it, and it may be collateralally impeached.—Wightman v. Karsner, 20 Ala. 453.

10. The evidence offered of the contents of the order of sale, being secondary, was properly excluded.—Boykin, McRae & Foster v. Collins, 20 Ala. 232; Smelser v. Drane, 19 *ib.* 245; Wiswall v. Knevals, 18 *ib.* 65; Yarbrough v. Hudson, 19 *ib.* 654; McDade v. Meade, 18 *ib.* 214; *ib.* 338.

11. The agreement as to the testimony of the witnesses did not authorize the admission of any illegal evidence; and, even if such had been its effect, it was competent for the court to relieve the party from the consequences of it.—1 Green. Ev. 240. It was a matter within the discretion of the court, and therefore not revisable on error.

12. The defendant in error was a purchaser for a valuable consideration.—Ohio Life Ins. Co. v. Ledyard, 8 Ala. 874; Bank of Mobile v. Hall, 6 *ib.* 639.

13. The delivery of the bill of sale was a symbolical delivery of the property, and passed the title.—Long on Sales 279. The case of Lanfear v. Sumner, 17 Mass. 109, cannot be regarded as common law: it is predicated on the rule of the civil law, which requires delivery of the thing to vest title; delivery is not necessary by the common law to pass title. The case is denied to be law in Connecticut (Ingraham v. Wheeler, 6 Conn. 284) and in New Hampshire (5 N. H. 573). It cannot be reconciled with the following cases: Portland Bank v. Stacey, 4 Mass. 663; Putnam v. Dutch, 8 *ib.* 287; Badlam v. Tucker, 1 Pick. 389; Jewett v. Warren, 12 Mass. 300; Joy v. Sears, 9 Pick. 4; Goodwin v. Howland, 2 *ib.* 604; Shumnay v. Rutter, 8 *ib.* 447, and 7 *ib.* 56.

GIBBONS, J.—The first question presented by the present record is, whether actual delivery of personal chattels is essential, in order to complete the contract of sale, and pass the title to property, as respects the creditors of the vendor. As between the vendor and vendee, the simple contract of sale, when complete in all its parts, undoubtedly passes the title; but as respects the creditors of the vendor, when the possession of the chattel remains with the latter after the contract of sale, does the title pass, so as to effect an actual change of prop-

erty? According to the doctrine of this court, as settled at an early day, where the possession of a chattel remains with the vendor, it is, as to creditors, a badge of fraud simply, and not fraud *per se*. Such possession, so remaining with the vendor, unexplained, is *prima facie* evidence of fraud, but still may be explained; and if consistent with good faith and the absolute disposition of property, and the transaction is *bona fide* throughout, then the title passes by the coutract of sale, notwithstanding the possession remains with the vendor.—Hobbs v. Bibb, 2 Stewart 54; Ayres v. Moore, *ib.* 336. The doctrine of these early decisions has never been departed from by this court, but has several times been subsequently recognized and followed.—Blocker v. Burgess, 2 Ala. 354; Ravisies v. Alston, 5 Ala. 297; Planters' & Merchants' Bank v. Borland, 5 Ala. 531; Mauldin & Terrell v. Mitchell, 14 Ala. 814. It follows, that there was no error in refusing to give the first charge prayed by the plaintiff, nor in giving to the jury the charge adopted by the court.

2. Neither did the court err in refusing to give the second charge asked. We know of no law, in our State, that requires such a bill of sale to be recorded; and if the defendant had taken the trouble to have had it acknowledged and recorded, his position would, in no respect, have been changed.—Hobbs v. Bibb, 2 Stewart, *supra*. This charge was therefore properly refused.

The third and fourth exceptions, as to the effect of the proof tending to explain the possession of Thomas Hall after the date of the bill of sale to William T. Hall, may be considered together. In each of these requests to charge, the plaintiff desired the court to say to the jury, that the possession of Thomas Hall was not sufficiently explained by the facts offered in evidence. This the court refused to do; and in the latter, the court left it to the jury to say whether the explanation of such possession was sufficient or not. We think there was no error in the refusal to charge as prayed in these requests; nor is there any error of which the plaintiff can complain, in the court's leaving it to the jury to say whether the possession was sufficiently explained or not. In the case of Planters' & Merchants' Bank v. Borland, *supra*, it is said, that fraud is a question of law, after the facts are found. Without calling in question the cor-

rectness of this position, but taking it as the rule governing in the present case, still there is no error of which the plaintiff can complain in the present case, in having the question of fraud left to the jury. The reason is, that, according to the rule as laid down in the case of the Planters' & Merchants' Bank v. Borland, the court should have pronounced upon the question of fraud in the fourth request to charge, and should have stated to the jury, that, on the facts proved, the possession was sufficiently explained. We have no hesitation in coming to the conclusion, that, on the facts set forth in the bill of exceptions, given in evidence in explanation of the possession of Thomas Hall, such possession was sufficiently explained, if the transaction was in all other respects *bona fide*. Leaving this question to the jury, therefore, by the court, was giving to the plaintiffs thereby another chance of a favorable result to them upon the point; whereas, if the court had done its duty, it would have taken the question of explanation entirely from the jury, and charged that the explanation given, if true, was sufficient, in law, to repel the presumption of fraud. We say nothing of the correctness of the rule as laid down in the case of Planters' & Merchants' Bank v. Borland, and Mauldin & Terrell v. Mitchell, *supra*, but simply follow it; and by that rule the plaintiffs in error have no cause to complain of any matter in the third and fourth requests to charge. If we were inclined to remodel the rule laid down, it would be made more stringent against the plaintiffs.

4. The fifth request to charge was, that the record from Dallas showed sufficient authority to the sheriff to sell the slaves levied on under the attachment. This the court refused, and charged the jury, that the said record did not show a sufficient authority to the sheriff to sell; and further, that, if that was the only authority under which the slave in question was sold by the sheriff, then the purchasers at said sale acquired no title. The court further asserted the proposition, that, in addition to the order of sale made by the court, as shown in the transcript of the record from Dallas, there must be a further order or process, from the clerk of the court to the sheriff, to proceed to execute the said order; and in the absence of such further order or process from the clerk of the Circuit Court of Dallas to the sheriff, the proceedings of the sheriff, in making the sale, were

illegal, his acts void, and the purchasers at said sale acquired no title. In this, we think, the court below mistook the law. The order, when examined, will be found to be, "that, unless the defendant shall replevy such property before the first Monday of July next, the sheriff of Dallas County do proceed to sell the same at the court house door, on that day, on the same notice, and in the same manner, as the law requires other sheriffs' sales to be conducted, and that he pay the proceeds into court, subject to the further order of this court." On examining this order, the statute under which it was made, and the affidavit, necessarily its predicate of the liability of the property to deterioration and waste, we are of opinion that, under the established practice in this State, it was well warranted. The property, at that time, it must be recollected, was in the custody of the sheriff; and the order is, that the sheriff sell it on a certain day, unless it be before that day replevied by the defendant. It is difficult to conceive how the sheriff could have a more direct and positive authority for making the sale, than the order of the court furnishes him. If the clerk had attempted to issue an order of sale to the sheriff, based upon the order of the court, he could only have copied the order, as he would have had no power to add to it, or diminish from it, a single word or line, so far as it was effectual in giving to the sheriff an authority to sell. The sheriff, like the clerk, is an officer of the court, and directly under its control. The court may well, in certain cases, for aught which we can see, give orders directly to the sheriff, for his action in matters pertaining to his duties; and all that the clerk would have to do, in such cases, would be to record the orders and directions of the court; but the clerk could neither direct, control, nor stay the action of the sheriff, where the latter was acting upon orders received directly from the court. The order to sell the property levied on as perishable, we consider as one of those orders where the court acts directly upon the sheriff, and the order is to him to sell, and not to the clerk to issue an order of sale. In the ordinary processes of a final executive character, issuing from courts, it is true, the clerk's signature is absolutely essential to give them validity, or to give to the sheriff authority for his acts in the premises; but that rule would not apply to a case like the one under consideration. The authority of the sheriff is found in

the fiat of the court, ordering him to sell; and if that could not give to the sheriff the power to make the sale, no process which the clerk could have issued could have given it to him.

Our conclusion is, that the order of the court was ample authority for the sheriff of Dallas to make the sale; and that the purchaser at such sale would take under it such title as Thomas H. Hall, the defendant in the attachment, had, at the time of the levy of the attachment.

5. It is difficult to determine what portions of the testimony of the witnesses Lovett and Lapsley were excluded by the court. The particular portion is not set out in the bill of exceptions, although the two entire depositions are made exhibits. That portion of the deposition of Lovett, which we suppose falls within the description of what was said to be excluded, may be found in the statement of the case; but we perceive no portion of the deposition of Lapsley which fills that description. It is insisted, that these depositions should have been read entire, without objection, under the agreement of counsel, of record. But on the examination of the agreement, we do not give to it that interpretation. The language of the agreement is: "And it is further agreed, that the testimony of John G. Lovett, taken by C. C. Pegues, shall be considered as regularly taken." This agreement is not broad enough to admit illegal evidence, if the testimony objected to was of that character.

The testimony ruled out is said to be that relating to the contents of the order of sale. In excluding this testimony, we see no error, inasmuch as, if the order of sale referred to was the one found in the record, it was of itself the best evidence, and should have been left to speak for itself; if it was an order issued by the clerk of the Circuit Court of Dallas, then it was rightly excluded, because the way was not sufficiently paved for the introduction of secondary evidence. The order itself, if such a one ever existed, was the best evidence. If that could not be produced, then its existence should have been distinctly proven, its absence accounted for, or its loss established, after the requisite searches had been made for it in the proper officer. All this proof was necessary, as preliminary to the competency of the proof of the contents of any order of sale not produced. The record does not show that such proof was made, and the secondary evidence was properly excluded. For the error that

intervened, in the ruling of the court upon the sufficiency of the order of sale to confer an authority upon the sheriff to sell the property, the judgment of the court below is reversed, the nonsuit submitted to by the plaintiff ordered to be set aside, and the cause remanded.

CHILTON, C. J.—Where a practice has long obtained, and a vast number of titles may fairly be presumed to be dependent upon it, it should require a very clear case to induce the court to depart from it; and an overruling necessity for the establishment of a different practice should exist, before the court would undermine the foundations of title and set them afloat.

It is always better to let the Legislature, in such cases, apply the corrective: for, in this way alone, can the supposed evil be remedied, without destroying titles which have been acquired in good faith and under the sanction of judicial sales. The fact that the practice has long obtained, in several of the circuits in this State, of selling slaves as perishable property, under certain circumstances, by virtue of the attachment laws, that it has been acquiesced in by the Legislature, and that no attempt has been made to alter it, is persuasive to show, that the practice, in the legislative contemplation, is not opposed to the spirit of the eighth section of the attachment law.

By the law, as it stood when this order of sale was made, the sheriff kept the slaves in jail. Now, it might often happen, that to keep slaves in this manner, pending a long litigation, would, in all human probability, result in their destruction; thus, it may be, destroying the only means for the satisfaction of the demand sued for, and inflicting an irreparable injury on the defendant. Besides, if the slaves were sick, with a disease which would be so aggravated by being thus kept as to result in their death, it would be most inhumane to them, as well as greatly prejudicial to the parties, to hold that they must be kept until the final decision.

All we hold is, that the order of the court, under the circumstances of this case, is not void, but effectual to pass the title to the purchaser. I do not think such orders should ever be granted, except in cases where the keeping of the property would likely result in its destruction, or great deterioration;

and in determining these questions, much must be left to the discretion of the court, to be exercised in reference to all the surrounding facts and circumstances.

LIGON, J.—I dissent from the conclusions attained by a majority of the court, as to the construction of the seventh and eighth sections of our attachment laws.—Clay's Dig. 56.

I hold, that the terms "clearly of a wasting and perishable nature," used in the seventh, and "to be likely to waste or be destroyed by keeping," employed in the eighth section of the act, as descriptive of the property which the judge or justice may command to be sold by interlocutory order, before judgment, were never intended by the Legislature to include slaves; nor are slaves necessarily included in them *ex vi termini.*

It will be remembered, that when this statute was passed, (1823,) personal property alone could be levied on by attachment, and consequently the terms were not employed to designate such property generally, but to distinguish one class of it from another; nor were they used to contradistinguish personal property from real estate. The question then arises, Are slaves so "clearly of a wasting or perishable nature," or so "likely to be destroyed by keeping," that we can suppose the Legislature intended to put them in this category? If other acts of that body are entitled to any weight, (and I feel bound to allow them some share in settling this question of intention,) we may safely answer, they did not. That they have been uniformly regarded as the most valuable and permanent of all personal property, by the law-givers of this State, will abundantly appear by the many enactments, whose object is to prevent their sacrifice, when sold by officers under legal process, or by executors and administrators to pay the debts of their testators or intestates.

It is provided, that slaves shall not be sold under execution, when the judgment is for a less sum than $100, if other property is to be found (Clay's Digest 202 § 7). Neither sheriff, coroner, nor constable, shall sell them at any other place than at the court-house of the county, or such other public place as is provided by law; and then, on a more

extended notice than is required on the sale of other chattels; and in the course of administration, when the other chattels of the decedent have proved insufficient to pay the debts of the estate, it is left discretionary with the Court of Probate, acting for the best interests of all concerned, to sell either lands or slaves for the payment of the remaining debts. In my opinion, these legislative provisions are utterly inconsistent with the idea that slaves were intended to be included in the sections of the law I am now considering.

Apart from this, this court has invested this species of property with attributes which pertain mainly to real property, and which exclude the idea that they should be regarded as of a "wasting and perishable nature," and "likely to be destroyed by keeping." In Price v. Price, 5 Ala. 578, and Williamson and Wife v. Mason, 23 *ib.* 488, it is held, that a contingent remainder may be limited in slaves; and in McWilliams *et al.* v. Ramsey, adm'r, at the last term, 23 Ala. 813, we have held them subject to a reversion after the termination of a life estate. I have been unable to reconcile these decisions with the idea that slaves are property, so wasting and perishable in its nature, as to require it to be sold, lest it may become valueless within the ordinary period of litigation in a suit in the Circuit Courts, or before a justice of the peace.

It is, also, a safe rule in ascertaining the meaning of terms employed in a statute, when they are not technical in their character, to give to them the meaning ordinarily attached to them in the community in which the law is to operate, or, in other words, to give to them that sense in which they are commonly received. I am inclined to think, it would be difficult to find a man, outside the pale of the legal profession, who would include slaves in the terms "perishable and wasting property," or "such as will be likely to be destroyed by keeping."

These sections of our law are not such, in my opinion, as to require that the terms used in them should be extended by construction. They are in derogation of the common law, and tend generally to abridge the right of the citizen to his property. Ordinarily, the property of the defendant, in an

action at law, is not subjected to the payment of the demand against him, until that demand is sanctioned and established by the verdict of a jury, and the judgment of a court.—Under these sections of the attachment law, however, it is subject to be taken from him and sold before judgment, and on no better evidence of his indebtedness than the mere affidavit of his pretended creditor. A proceeding so summary, and based upon so unsubstantial a foundation—a foundation which would not be allowed, in our courts, to occupy a place in establishing a demand for more than $100—deserves no favor at the hands of the court; certainly not so much as to extend terms beyond their ordinary import, to sustain it.

If slaves are not included in the terms used in the seventh and eighth sections of our attachment laws, then the court below had no jurisdiction to order the sale of those in controversy. The fact that the plaintiff in attachment takes the oath required by the law, cannot change the nature of the property levied on, or give the judge or justice authority to sell such as is not within the meaning of the statute. Those officers do not derive their power to order a sale from the affidavit of the plaintiff, but from the nature of the property, and the provisions of the law. The affidavit is the means appointed by the statute to bring the levy and the character of the property to the knowledge of the judge; and if one swears that property is perishable, which is not so in fact, the judge should not credit the absurd affidavit and order a sale. If he does, he acts without authority, and his order is null and void.

Such is the case here; and my conclusion is, that the sale made under the order is void, that the purchaser takes no title by his purchase, and that the right of property in the slaves remains where it was before the order and sale were made.

The practice under this statute by the judges of the Circuit Courts, it is said, generally conforms to that adopted in this case. I know that this practice is not universal. But were it so, I would not sanction it; because I am satisfied that it is erroneous, and that the courts below ought not to be allowed to make rules of construction or practice for this court, but should receive their rules from us.

The fact that claims to property have arisen under erroneous decisions of the inferior courts, is entitled to no weight, for the obvious reason, that whenever one of these *claims* arises, some other person has been illegally deprived of his *right*, who is much more entitled to the protection of this court.

NOTE by Reporter.—After the delivery of the foregoing opinions, the counsel for the defendant in error made application for a re-hearing; and in support of his application he submitted the affidavits of several attorneys of this court, stating that they had never known slaves to be sold as "perishable property" under the attachment law, and that the practice of the Bar, so far as their experience extended, did not warrant such orders. On this application the following opinions were pronounced:

GIBBONS, J.—In this case, an application is made for a rehearing, predicated upon a supposed error into which the court fell in the opinion delivered in the cause, in recognizing the doctrine as correct that negroes can, in any case in attachments, be sold on the order of a judge as wasting or perishable property, under the acts of our Legislature, found in Clay's Digest, page 56, § § 7 and 8.

In the opinion delivered by a majority of the court, the doctrine above stated was recognized simply, but no attempt was made to argue the question. The member of the court who prepared the opinion delivered by the majority, deemed it sufficient to base his conclusion upon this point upon his own observation and experience, both at the bar and upon the circuit court bench. Inasmuch, however, as there seems to be a different understanding as to the practice in different portions of the State, amongst members of the profession, and inasmuch as one member of the court has deemed it his duty to dissent from the conclusion attained by a majority in the opinion pronounced, we deem it proper to consider the question as one entirely new, and to discuss it, by itself, upon principle independent of any practice in any portion of the State. Thus regarding the question, we are free to announce, in the commencement of the discussion, that our subsequent examination and reflections upon the subject have but confirmed the majority of the court in the correctness of the doctrine announced in their first opinion.

The question is, can negroes, in any case, be sold under our attachment laws, above cited, by the order of a circuit judge, "as perishable property" or as property liable to waste or be destroyed by keeping? It has been well remarked, that we have but two legislative provisions upon the subject, and those are the ones cited above, viz., sections 7 and 8 of Clay's Dig., page 56. The former section provides for the issuance of the attachment process, on debts not yet due, and in that case, the words of the act are: "But if the property so attached be clearly of a wasting or perishable nature, then the same shall be sold," &c. As this language is used in reference to attachments issued on debts not yet due, it would doubtless have to be confined in its construction to the precise case made by the statute, and would not be applicable to any other. The eighth section seems to contain the general law, and is the one applicable to all cases other than that provided for in the seventh section.

The language of the eighth section is: "When any estate attached shall, on the oath of the plaintiff, his or her attorney, or agent, or other credible person, be certified to any judge, or justice of the peace, to be likely to waste, or be destroyed by keeping, and if the person to whom it belongs, his or her attorney, agent or factor, shall not, within twenty days after the levy of the attachment, replevy the same, then such estate shall, by the order of said judge or justice, be sold," &c.

The language of this act is: "When any estate attached shall be certified to be likely to waste or be destroyed by keeping." It will not be contended, we apprehend, that there is anything in this phraseology which, in itself, necessarily excludes slave property. The term "any estate" may well comprehend all property upon which a levy may be made. If, therefore, slave property is exempt, it must be because it is not comprehended within the spirit and scope of the statute. This is the precise question that we propose to discuss.

Let us look, for a moment, at the obvious intent and design of the statute. The Legislature has provided a summary remdy for the collection of debts, in cases where, by the ordinary process, there would be no remedy at all. It has authorized the seizure of goods and chattels as the leading process in the cause, and has also provided for the replevy of the goods so

seized and attached. But there is a case not yet provided for; and that is, where the goods are not replevied, and by keeping them in the hands of the sheriff or other officer, they will yield no fruits to the suitor. The statute then provides a remedy for that case, and permits them to be sold, and the money brought into court. We think it may safely be asserted, that the object and design of the statute was, as well to protect the attaching creditor, and give him a fruitful remedy against his debtor, as to protect the debtor, and prevent the sacrifice of his property without accomplishing the payment of his debt. Both the creditor and debtor have an equal interest in the sale of the property falling within the scope of the statute, as it pays the debt on the one side, at the same time that it deprives the other of the property. But for this law, the debtor would often be deprived of his property, whilst the debt for which the attachment was issued would be left unpaid.

Keeping in mind this object and intent of the statute, let us advance now to the inquiry into the meaning of the terms "likely to waste or be destroyed by keeping." These terms are obviously susceptible of two constructions: the one, the strict construction, meaning those articles only which are in themselves perishable, and contain within themselves the elements of their own destruction and decay; as, for instance, ripe fruits, fresh meats, and articles of a similar nature. With this definition applied to the terms, they would necessarily comprehend but very few articles of the vast variety of personal estate liable to attachments. Giving to the terms this rigid construction, it would not matter if it was shown to perfect demonstration that, at the termination of the litigation, the article attached would become utterly worthless to the creditor; if the expense of keeping until the final judgment and execution would be fourfold the value of the article levied on, unless it contained in itself the element that would necessarily effect its own destruction, no order could be made by any judge or court for its sale.

Take, for instance, a horse, a mule, or live stock of any kind. These could not be brought within the above stated definition, for they are not perishable in that sense of the word, and yet they would destroy themselves twice over, in nine cases out of ten, if they were to be kept by the sheriff, after being levied on

under attachment, until the end of the litigation; and yet no authority is found, under the above construction of the words of the statute, to obtain an order for their sale. If the above construction were to prevail, not one article in one hundred of the vast variety of personal property liable to attachment could be sold, although it might be shown, to the satisfaction of any one, that by keeping it would prove fruitless to the attaching creditor at the same time that the debtor would be deprived of his property.

The other construction of which the terms above mentioned are susceptible, is, that they comprehend all those articles which not only contain in themselves necessarily the elements of decay, but also those which, by being kept by the officer levying upon them, would become fruitless to the creditor, and by consequence an entire loss to the debtor. This construction certainly agrees entirely with our ideas of the object and intent of the statute. Giving to the statute this construction, it will be seen that its terms are quite comprehensive: all that is necessary to be shown is, that the article levied upon is likely to waste or be destroyed by keeping. It need not be shown that it will necessarily waste or be destroyed; but, if it be likely to waste or be destroyed, it may be sold—not one particular article, or one species of articles, but *any estate attached.* This construction of the terms of the statute, we are satisfied, is what the law makers intended by them, and is sanctioned both by sound reason and common sense. Giving to these terms this construction, can they, in any case, comprehend slaves?

We apprehend no one would contend, if a horse or mule was levied on, in a city where the expense of keeping would be some fifteen or eighteen dollars per month, and the ordinary term of pushing an attachment to final judgment was 12 months, that such horse or mule would be considered as not falling within the spirit of the statute, because, before the final judgment, he would have eaten up his value and much more. And why would he be considered as falling within the terms of the act? There may be nothing in his case that would tend to show that he would not out live a dozen such suits. It is not, then, because he has in himself necessary the element of decay and destruction, but because by keeping he would be wasted and destroyed to the plaintiff and defendant, and therefore comes within the spirit of the

statute. The same reasoning is applicable to all cases. If it is shown that by keeping the article it will necessarily become or is likely to become worthless to the creditor, and by consequence to the debtor, then it is embraced by the statute. It matters not, in our opinion, what the subject matter is: it may be cotton bales, live stock, hardware, provisions, or dry goods; if by keeping them to the end of the litigation, they will prove, or be likely to prove, fruitless to the creditor, he may have them sold, on the order of the judge, according to the statute in such case made and provided.

We would now ask, where is to be found in our law, or in our policy, anything militating against the construction of the act above given? There is certainly nothing in the act itself, which contravenes this idea, but on the contrary, as we have shown by the terms of the act itself, everything tending to show that no exception was intended to be made of anything whatever. It is conceded, that in the administration of estates, and in the law of executors, in this State, distinctions are made in favor of slave property. But it does not follow from this, that slaves were intended not to be comprehended in the above mentioned terms of the statute. As long as slaves are considered "*property*" and "*estate*," we cannot, by our decision, so legislate as to screen them from the operation of a statute, when the terms which it employs make no exception in their favor. If slaves are to be subjected to the payment of debts, what reason or good sense is there in saying that they should be liable to be lost to the creditor, as well as the debtor, because they are slaves? It must be recollected that the statute is one designed for the mutual benefit of the creditor and debtor, and every article that is exempted from its operation, when it is levied on and subjected to expense by way of keeping, is to that extent doomed to destruction, so far as the parties litigant are concerned. But it is said, if slaves are to be comprehended in these terms of the statute, it will often operate a great hardship to the debtor, by often causing favorite slaves to be sold at a great sacrifice. We confess we do not comprehend the force of this argument. In the first place, the provision of the statute is for those cases where the party has failed to replevy the property; and a sale of the property, fairly made under the order of the court, must be considered as favorable to the debt-

or, so far as the price is concerned, at one time as at another; and if the property is sold before final judgment, instead of after, the debtor is saved all the expense of keeping the property.

But it is insisted, that the attachment may be levied, and property sold, upon a false or spurious claim. This argument proves too much. It goes against the whole policy of the law, as well against those cases clearly falling within the terms of the act, as against those which are doubtful. But, as an answer to this argument, it may be said, that, when an attachment is sued out, the attaching creditor has to give bond and security, to answer in damages for all the wrongs that may result from the wrongful suing out of the same. With this remedy, which the statute has provided, the defendant has in all cases to be satisfied. If it is defective, the Legislature alone can correct the evil.

According to the views which we entertain, there may be cases, where slaves, being levied upon and put in jail, would be as much subject to the statute as any other species of property. If, for instance, in a sickly season, with an epidemic raging in the vicinity of a jail, where were kept slaves in custody under an attachment; or, if the slaves are so affected by the confinement, or other regimen to which they are necessarily subjected in the hands of the officer, as that they will be greatly deteriorated in value at the termination of the litigation, or, if by the expense of keeping they would become fruitless to the attaching creditor, or be likely to become so, in any and all of the above cases, we consider it entirely proper to obtain an order for their sale, and that such an order is well warranted by a fair construction of the statute.

For these reasons, the application for a rehearing is refused.

LIGON, J.—The reasons assigned by the majority of the court, for refusing to grant a re-hearing in this case, have failed to impress me with such force as to cause me to change my opinion in respect to the construction of the seventh and eighth sections of our attachment laws, under which the sale of the slaves in controversy was ordered.

The reasoning adopted by them would, in my opinion, be much more prevailing than it now is, were it not for the

fact, that at the passage of the sections above referred to, personal property *alone* was subject to be levied upon under writs of attachment: so that where the terms "liable to waste or be destroyed by keeping" were used by the Legislature, they were employed to distinguish one class of personal property from another, and not as a distinction between personal property and real estate.

It appears to me, that no other property was intended to be subjected to the speedy sale provided for in those sections, than such as would waste, or be destroyed, by the mere act of keeping, irrespective of the costs and charges incident to having it safely kept until the termination of the suit. Thus, grain; ungathered, or unpacked cotton; merchandise on shelves, or in boxes; woollen goods, subject to be attacked and rendered valueless by insects; provisions; groceries; and numberless other articles of every day possession and utility, which may be readily enumerated, and which, in the aggregate, form a large portion of the personal property in every community, may well be included in these terms; while it would be difficult to extend the words of the statute to slaves, who are intelligent beings, endued, in an eminent degree, with the instinct of self-preservation, and with sufficient reason and judgment to render the promptings of this instinct effectual. While the former class of personal property, from its very nature, must be presently used, or disposed of, in order to prevent deterioration in state and value, the latter may remain for years not only uninjured, but often increasing in value. The idea of permanence in state and value, when applied to personal property, must always be relative, and not absolute.

The words of the statute necessarily imply a comparison, as to permanence, between several classes of *personal* property: while they assert, in terms, that one class is likely to waste, or be destroyed *by keeping*, they impliedly admit the existence of another class which is not. The opinion of the majority of the court, in effect, destroys this distinction, and cannot, therefore, be a correct exposition of the statute under review.

I have said, that when the seventh and eighth sections of our attachment laws were enacted, *real* estate was not sub-

ject to levy by attachment. This may be seen by examining Clay's Digest, p. 56, § § 7, 8, and p. 60, § 29. The two former sections existed in 1833, while the latter was enacted in 1837; so that the terms used in sections seven and eight could have had no reference whatever to the distinction between real estate and personal property. The majority of the court seems not to attach any importance to this consideration, as it is unnoted in their opinions. Their sweeping definition includes all personalty, and thus renders the words used in the seventh and eighth sections meaningless and absurd. To this view I cannot assent. I regard them as descriptive of a certain class of personal property, which is easily ascertained, and I desire to give them effect, as well as to put down abuses practiced under them.

For these reasons, and those set out in my dissenting opinion heretofore delivered in this case, I think a re-hearing should be allowed.

MOORE *vs.* CLAY.

1. In an action of slander, the defendant may show, in mitigation of damages, that he was incited and provoked to the utterance of the slanderous words, by some act or declaration of the plaintiff, contemporaneous with the speaking of the slander, or nearly concurrent therewith; but to render such act or declaration of the plaintiff admissible in evidence, it must be shown to have been the immediate and proximate cause or provocation of the slanderous words: it is not sufficient, to show that it occurred, and was communicated to the defendant, before the speaking of the slanderous words.
2. When the record shows an error in the conditional admission of evidence, it must also show that the error was rectified or cured by the introduction of the proper preliminary proof, or the judgment will be reversed: the Appellate Court will not presume that the error was corrected, or deprived of its injurious effects, because the bill of exceptions does not purport to set out all the evidence.

ERROR to the Circuit Court of Sumter.

Tried before the Hon. B. W. HUNTINGTON.

Bliss & Baldwin, for plaintiff in error.

Robert H. Smith, *contra*.

CHILTON, C. J.—Moore sued Clay for slander, for that he said of him, he was a hog thief, and that he could come near proving it.

On the trial, after the plaintiff had introduced proof tending to establish the speaking of the words charged in the declaration, the defendant proposed to prove by a witness, that, before such speaking, the plaintiff had been in the habit of using language derogatory to the character of the defendant, viz., that he cursed the defendant in a conversation had with the witness, and said he, the defendant, was a hog thief. The plaintiff objected to this proof, but the court admitted it, on condition that it would be ruled out, unless it was shown that the defendant had notice, before the speaking of the words declared on, of such declarations.

The witness stated that, sometime before the defendant spoke the alleged slanderous words, the plaintiff had the above mentioned conversation with him, and that he communicated what the plaintiff had said to the defendant, before the defendant spoke the words counted on. The plaintiff then moved to exclude the proof of what he had said; but the court refused, and he excepted.

In mitigation of damage, as showing the absence of a settled malicious purpose to injure the reputation of another, the defendant may be allowed to show that he was excited and provoked to say what he did, by some act or declaration of the plaintiff, occurring at the time of his speaking the words charged against him, or so nearly concurrent as that the speaking or acting of the plaintiff may reasonably be presumed to have incited and provoked the speaking of the slanderous words declared on. In such case, the concurrent declarations become parts, as it were, of the *res gestæ*, and aid the jury in arriving at the *quo animo* the slanderous words were spoken by the defendant. The same result would follow, if the defendant had used the slanderous expressions immediately, or so nearly contemporaneously as to make them part of the transaction, upon receiving information of what the plaintiff had said.

On the other hand, it is certain that one slander cannot be

set off by another, and unless the record shows that the words spoken by the plaintiff were the immediate or proximate cause or provocation for the slanderous words of the defendant, the proof of them was inadmissible.—See 2 Stark. on Slander 95; 3 B. & C. 113; 6 Murph. R. 465; 7 Wendell's R. 560; 13 Pick. 503.

The court below ruled that it was sufficient if the plaintiff's declarations were communicated to the defendant *before* the speaking of the slanderous words by him. This was laying down the rule too broadly. We have shown the party must go farther to render the proof legal.

It is, however, contended that we must intend, in order tosustain the judgment, that the necessary preliminary proof was made connecting the mutual slanderous expressions, so as to make the one the immediate provocation of the other, the bill of exceptions not purporting to set out all the proof.

In reply to this we have only to say, that the court was put in error as to the condition upon which he would rule out the testimony, and if the facts of the case would have justified it, it was the duty of the judge to have shown in the bill of exceptions that the error was rectified or cured by the introduction of the necessary preliminary proof. The rule is, that when the court is shown to have committed an error, it must set itself right, and this court cannot intend, in the absence of a statement to that effect in the record, that the error was corrected or deprived of its injurious effects.

Let the judgment be reversed, and the cause remanded.

CHIGHIZOLA'S HEIRS *vs.* DOE EX DEM. ESLAVA.

1. After the rendition of a judgment in ejectment for the plaintiff, the parties entered into a written agreement, fixing a different boundary line from that ascertained by the judgment; at the bottom of this agreement was written, in the handwriting of the presiding judge, this memorandum: "The judgment heretofore rendered in this case is set aside, and the foregoing agree-

ment;" and the agreement was entered on the minutes of the court at the same term: *Held*, that this was not sufficient evidence to authorize the rendition of a judgment *nunc pro tunc* at a subsequent term, and that the previous judgment was valid and subsisting.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

ESLAVA obtained a judgment in ejectment against Jaques Chighizola, which was regularly entered on the minutes of the court on the 23d of April, 1844. On the 30th of May following, during the same term of the court, the parties entered into the following agreement: "In this case, the plaintiff and defendant agree that their mutual boundary line shall be as follows: beginning on the east side of Water street, at the distance of fifteen feet from the north line of Eslava's brick warehouse, and running eastwardly, and parallel with said brick warehouse, to the head of the wharf; and the judgment in said cause to be entered up accordingly; and this agreement to be filed in the case, to evidence the settlement of the boundary line. As witness my hand and seal, this 30th day of May, 1844." This agreement was signed and sealed by both parties, and attested by a witness; and at the foot of it, in the handwriting of the presiding judge, was written this memorandum: "The judgment heretofore rendered in this case is set aside, and the foregoing agreement." This agreement was "entered at large on the minutes," on the 30th of May, 1844.

No execution was sued out on his judgment by the plaintiff; but after the death of Chighizola he sued out a *scire facias* to revive the judgment, against his heirs at law and personal representatives, who are the plaintiffs in error. On the return of the *scire facias*, the defendants therein appeared, and pleaded *nul tiel record*; "and produced from the original file of papers in the cause the agreement above set out, and proved the said memorandum to be in the handwriting of the presiding judge; and moved the court that judgment *munc pro tunc* be entered upon said agreement, and in conformity thereto, said agreement having been spread upon the minutes of the court; which motion was overruled. The plaintiff then produced the judgment described in the *scire facias*; and the court, upon consideration,

determined it was sufficient to support the same, and adjudged that the writ of possession may issue upon the judgment described in said *sci. fa.*"

The record sets out what purports to be a bill of exceptions, signed by the presiding judge, from which the above stated facts are extracted; but it does not appear that any objection or exception whatever was taken to the ruling of the court.

The judgment on the *scire facias*, and the refusal to enter judgment *nunc pro tunc*, are now assigned for error.

C. W. Rapier and P. Phillips, for plaintiffs in error.

Geo. N. Stewart, *contra*.

LIGON, J.—An inspection of the record in this case clearly demonstrates, that the judgment of the court below on the *scire facias* is free from error. The judgment on the minutes of the court at the Spring term of the Circuit Court, 1844, and that recited in the writ of *sci. fa.*, are the same, and on being inspected by the court below, on the issue of *nul tiel record*, fully justified the court in rendering judgment for the plaintiff, and ordering the writ of *habere facias possessionem* to execute that judgment.

But it is contended, that the agreement between the parties, entered on the minutes of the court at the same term at which the judgment of the court had been pronounced on the finding of the jury, taken in connection with the memorandum of the presiding judge found on said agreement, shows that the first judgment was vacated, or set aside, and is not, therefore, a valid and subsisting judgment which will support the *sci. fa.*, or justify the court in awarding execution against the defendant.

We cannot give our assent to these propositions. The agreement of the parties that a different boundary from that ascertained by the judgment of the court should be established between them, although that agreement is entered on the minutes, cannot have the effect to vary or vacate a judgment rendered more than a month previous, and which was complete in all its parts. The action of the court is indispensably necessary to make such alteration, and that at the same term at which the first judgment is obtained. If the judge fail to act in the matter at that term, his power over the judgment is gone, and it must remain as it was originally entered, and conclusive

between the parties, until it is reversed or vacated by some revisory tribunal. It is true, that if the judge does act in the premises, and makes a memorandum on his docket sufficiently certain to show what that action was, and the clerk fails to enter up the judgment accordingly, the judge, at any time before the first judgment is executed, may, on motion, correct the first judgment, by entering up a judgment *nunc pro tunc*, in accordance with the memorandum so made at the trial term of the cause. While, however, the judgment remains without amendment, the memorandum of the judge, though full and explicit, and showing that it should have been entered up in a manner different from what it appears on the record, is not available to the defendant on a *scire facias* to revive the judgment.—Hall v. Hudson, 20 Ala. R. 284. But, we apprehend, this could not be done upon a loose and inconclusive memorandum, made by the judge on a paper in the cause, or even on his docket; nor could it be done, if the entry so made by the judge was certain as far as it went, but was evidently left in an unfinished state. If it were not completed, the most natural inference would be, that the judge, for good reasons operating upon him at the time, designedly forebore to finish the order.—Brown v. Bartlett, 2 Ala. R. 29; *ib.* 164.

The entry relied upon in this case, to show that the judgment on which the *sci. fa.* issued had been set aside, although made by the judge who presided at the trial, was not made on the docket on which such entries are usually made, and to which reference may be had to correct clerical misprisions; but on a fugitive paper, which came into the cause after a perfect judgment, founded on the finding of a jury, had already been duly rendered by the court. It is without date, and incomplete in itself. No action could rightfully be taken upon it at a subsequent term. If it could be looked to at all, or relied upon to direct the action of the court at a subsequent term, it could only control the court so far as it is complete; and in the present case, the fullest effect that could be given to it would be, to set aside the former judgment, without authority to render any other. It would not authorize the rendition of the judgment according to the terms of the agreement, as the memorandum of the judge does not extend thus far. The legal effect would be the same, as if a new trial had been granted by the court, thus

vacating the former judgment altogether. This would go to the *scire facias*; but as it rests only upon the memorandum of the judge, on a paper on file in the cause, it could not hinder the revival of the judgment.—Hall v. Hudson, *supra*.

Our conclusion is, the judgment must be affirmed.

FLOREY'S EXECUTORS *vs.* FLOREY.

1. Upon questions of insanity, a witness whose acquaintance with the party has been such as to enable him to form a correct opinion of his mental condition, may not only depose to facts conducing to establish unsoundness of mind, but may also, in connection with those facts, give his own opinion upon the question of sanity or insanity.
2. The practice of admitting illegal evidence, and afterwards excluding it, is improper, because of the difficulty of eradicating from the minds of the jury the impression which the evidence may have made; but, where the record shows a clear and unequivocal charge, withdrawing and excluding such evidence from the consideration of the jury, its admission is, at most, error without injury.
3. Fraud, or undue influence in procuring one legacy, does not invalidate other legacies which are the result of the free will of the testator; but if the fraud or undue influence affects the whole will, though exercised by one legatee only, the whole will is void.
4. An insane delusion, existing in the testator's mind at the time of the execution of his will, as to the principal legatee being his son, renders the will void, if it is the offspring of that insane delusion.
5. Where the principal legatee, who was born in lawful wedlock, two or three years after his mother's marriage with the testator, bears the peculiar, distinctive marks of the negro, while his mother and the testator were white persons of fair complexion, the testator's belief that the legatee was his son, is admissible evidence for the purpose of showing mental delusion on this particular subject.

ERROR to the Court of Probate of Shelby.

The plaintiffs in error, as executors of Gustavus Florey, deceased, propounded for probate a paper, purporting to be the last will and testament of their testator, the validity of which was contested by Edward Florey, "as brother and next of kin

to the testator," on the grounds of fraud, undue influence, and because the testator was not of sound and disposing mind and memory at the time of making said will.

On the trial of these issues, it was shown that the testator died on Sunday night. There was evidence showing, that, on the Tuesday night before his death, a paper was drawn up by one Lewis Sentile, which the decedent executed as his last will and testament, by which he gave to Edward G. Florey, whom he recognized as his son, a life estate in his property, with remainder to his children, if any, and in default thereof then to the two daughters of one Joseph A. Skinner; that he was satisfied with this up to the Friday evening before his death; that on Saturday John N. Cohill, one of the proponents, visited him, and advised him to send for a physician, to which the testator objected, but notwithstanding his objections, said Cohill went for Dr. John Singleton, and afterwards sent a negro for Dr. William Singleton, the other proponent, both of whom visited the testator between the hours of twelve and two o'clock that night, when, at the request of the testator, the paper in dispute was drawn up by Dr. John Singleton; that said paper was read to the testator, and was executed by him in the presence of two witnesses, and shortly afterwards, on the arrival of a third witness, it was again read to the testator, and by him acknowledged as his last will and testament, and was then attested by said last witness. By this will, the testator's entire estate is bequeathed to Edward G. Florey, whom he calls his son, for life, and at his death to be equally divided between Henrietta Skinner and Nancy Skinner, daughters of Joseph A. Skinner; and the proponents, said John N. Cohill and William Singleton, are appointed executors.

"One John W. Florey was offered as a witness for the contestant, who testified, that he had known the testator intimately for thirteen years, had lived close to him, and had several times stayed with him three weeks at a time; that he had gone with him several trips to Wetumpka, with a wagon; that he had good opportunities of knowing his habits, and the condition of his mind, and of discovering any evidences of mental alienation; that he went to the house of said Gustavus Florey on Saturday morning, the date of the will offered for probate, and found him in a dozing condition; that he was very low, and sinking;

had some fever; he would doze off, and then wake up looking perfectly wild; that he would call the negroes by name, and when they came to his bed, he would say nothing to them, unless they questioned him, and then he would reply in the affirmative to any question put to him; that he waked up, and called Edward G., who had hold of him by his side, and said, "I suppose he is out drinking and frolicking with the negroes"; that his complexion was pallid, and his features sunken; that he would endeavor suddenly to get up, and ask to be carried to the door, and, when carried there, he would sometimes want to go back, and at other times to be carried out of doors; that he was sinking all day, and became speechless about ten or twelve o'clock on the same night, during which he died; that he was about sixty years of age, and had been afflicted with rheumatism for several years before his death.

"On being asked to state his opinion, in connection with the facts to which he had testified, as to the sanity or insanity of the testator, at the time he executed the paper offered for probate, witness stated, that he was of opinion he was of unsound mind. The plaintiff objected to this question; but his objection was overruled, and he excepted. The contestant then asked the witness, if the testator was not in the full possession of all his faculties at the time he executed said paper, to state any facts which induced him to believe that there was a difference in the state of his mind at that time and when in health; to which question the plaintiffs objected, but their objection was overruled, and they excepted."

Another witness for the contestant testified, that he was sent for on the day the said paper bore date, and asked to come to the testator's house; that he reached the house immediately after the last witness had signed the will, and while the paper was being folded up; that he was met at the door by the proponent, William Singleton, and told "that he need not go in,—that the old man was nearly gone, and would not know him."—The plaintiffs objected to this evidence, but the court overruled the objection, and they excepted.

"When the judge came to charge the jury, all the declarations of the executors were excluded and withdrawn from the jury by the court, and all the acts of the executors excluded and withdrawn from them, except those acts which occurred at

the time the will was being executed, and constituting a part of the transaction.

"The plaintiffs asked the court to charge, that, if they believed from the evidence that there was undue influence on the part of any one of the legatees, and not as to the others, they must find the will void only as to those participating in said fraud; which charge the court refused, and the plaintiffs excepted.

"Proof having been given to the jury, tending to show that the said Gustavus Florey intermarried with the mother of the said Edward G. about the year 1816, and that some two or three years thereafter the said Edward G. was born; that the said Gustavus Florey has ever recognized and treated said Edward G. as his son; that the said Gustavus was a white man, of fair skin, and that the mother of said Edward G. was also of fair skin, and a white woman, while the said Edward G. was of dark skin, and mulatto color, with woolly or kinky hair, the defendant asked the court to charge the jury, that, if they believed from the evidence that, at the time the will was made, Gustavus Florey was under an insane delusion as to Edward G. being his son, and that the will was the offspring and result of such delusion, the will is void, and must be set aside; to which charge the plaintiffs objected, but their objection was overruled, and they excepted."

The rulings of the court upon the testimony, the charge given, and the refusal to charge as requested, are now assigned for error.

White & Parsons, for plaintiffs in error:

1. The facts set forth in the record, do not show that the witness, John W. Florey, had such a long and intimate acquaintance with the decedent, as authorized him to give his opinion as to his mental *status* at the time he executed this will.—Norris v. The State, 16 Ala. 776; Roberts v. Trawick, 13 *ib.* 84, 85.

2. A number of declarations and acts on the part of the executors, were permitted to be given in evidence to the jury; and when the court came to charge the jury, "all declarations and acts of the executors was excluded from the jury by the court, except those which occurred when the will was executed."

This was not sufficient to cure the error: nothing but an express charge from the court, that they must not regard the illegal evidence, will cure the error.—DeGraffenreid v. Thomas, 14 Ala. 688; 15 *ib.* 624; 12 *ib.* 824. That these declarations and acts were inadmissible, see Dennis, Strickland & Co. v. Chapman, 19 Ala. 29.

3. The charge asked should have been given. It is in strict accordance with the rule laid down, with regard to deeds, in the case of Anderson v. Hooks, 9 Ala. 704, viz., "A deed may be void in part, and stand good as to the residue." To avoid the will for this reason, it must appear that the remainder-men participated in it.—Stover v. Harrington, 7 Ala. 142. A will void as to the party procuring it, through fraud or undue influence, may be good as to other parties.—15 Law Lib. 145: Lovelass on Wills, m. p. 271; Atkins v. Kron, 2 Iredell's Eq. R. 58. There was no evidence of fraud or undue influence on the part of Edward G. Florey, or of any other person in his behalf.

4. The charge given is erroneous, for many reasons: 1. Because it sets aside the whole will, and defeats the rights of the remainder-men, because the testator was under an insane delusion as to Edward G. being his son. Even if this were sufficient to defeat the legacy to him, it does not interfere with their rights; theirs was a vested remainder.—Pitts v. Curtis, 4 Ala. 350; 1 Roper on Legacies, pp. 489, 490; Billingsley v. Harris, 17 Ala. 214; Ward on Legacies (8 Law Lib.) 169; *ib.* 175, 176, 177; 2 Black. 166; 2 Pick. 243; 1 *ib.* 147; 5 *ib.* 528. The legal estate vests in the executors, and only an equitable estate in the legatee.—5 Paige 318. 2. A false reason given for a legacy does not, of itself, destroy it, unless there is fraud, from which it may be presumed that, if known, the legacy would not have been given.—Kennell v. Abbot, 4 Vesey 807; 1 Story's Equity, § § 182, 183; *Ex parte* Wollop, 4 Bro. C. C. 90. In any event, the property would have passed to Skinner's children, and not to the heir. The intention of the testator was, not to die intestate.—3 Pr. Wms. 20, and cases cited in note (b); 4 Vesey 804; 2 Pr. Wms. 308. The ground of the heir's title is, that whatever is undisposed of remains to him.—3 Wheat. 583; 9 Mod. 167; 3 M. & S. 300. The charge is objectionable, also, because it is couched

in language which appealed to the prejudice of every man on the jury, as to the paternity of Edward G. Florey; its necessary tendency was, to mislead the jury.—16 Ala. 61.

RICE & MORGAN, *contra*:

The first question, as to the admissibility of the testimony of John W. Florey, is covered by the decision in Norris v. The State, 16 Ala. 776, which is sustained by the recent case of Baldwin v. The State, 12 Missouri 235, and Stewart v. The State, 19 Ohio 307. The idea that the statements of this witness (that he had known the testator intimately for thirteen years, &c.), were mere opinions or conclusions, and not admissible to show the competency of the witness to give his opinion as to the sanity or insanity of the testator, is unsanctioned by law. Massey v. Walker, 10 Ala. 290; Head v. Shaver, 9 *ib.* 791.

The charge asked by the proponents was properly refused: it asserts a legal proposition which is untenable, viz., that a legacy is valid, if it is not procured by the undue influence of the legatee himself, although it may have been procured by the undue influence of some other person; whereas the law is clear, that "no one can hold an interest obtained through the fraud (or undue influence) of another, any more than if the fraud were comitted by himself."—Bowers v. Johnson, 10 Sm. & Mar. 169; Meadows v. Smith, 7 Iredell's Eq. R. 7; Hunter & Thomas v. Tatum, 14 Ala 557. The charge was also objectionable for another reason: it entirely excluded from the jury the consideration of the principal question in the case, viz., whether the will was the offspring of insane delusion, and the evidence relating to that issue.—Nabors v. Camp, 14 Ala. 460; Mims v. Sturdevant, 16 *ib.* 154; Carlisle v. Hill, 16 *ib.* 398; Murray v. The State, 18 *ib.* 727; Ames v. Schuessler, 14 *ib.* 600.

The charge given affirms a clear proposition of law. There is no middle ground between capacity and incapacity to make a will.—McElroy v. McElroy, 5 Ala. 81. If the will was the offspring of an insane delusion, it was the result of incapacity to make a will.—Williams on Executors, vol. 1, pp. 23 to 30. If the will was void for any reason, it was void *in toto*.—Badger v. Phinney, 15 Mass. 364; Poth. 1, 13; 3 Hawks 469; 14 Ala. 557.

GOLDTHWAITE, J.—The objections taken by the plaintiffs in error to the testimony of the witness, John W. Florey, cannot be sustained. The rule, of late years, has been conclusively settled, that upon questions of insanity, a witness whose acquaintance with the party has been such as to enable him to form a correct opinion as to his mental condition, may not only depose to facts conducing to establish the unsoundness of his mind, but may also, in connection with those facts, give his own opinion upon the question of sanity or insanity.—Norris v. The State, 16 Ala. 776, and cases there cited; Baldwin v. The State, 12 Mo. 235; Stewart v. The State, 19 Ohio 307; Potts v. House, 6 Ga. 324. It was shown, in the present case, that the witness had been intimately acquainted with the deceased for thirteen years, and had frequently been at his house for weeks together; and under the influence of the rule we have stated, we do not entertain a doubt, that his opinion, as to the mental condition of the deceased, based upon the facts sworn to by him, was competent to go to the jury, in connection with those facts.

2. Neither can the objections made, in the court below, to the admission of the declarations of William Singleton, one of the persons named as executor, be sustained, for the reason that the bill of exceptions shows, that this evidence was, by the charge of the court, excluded and withdrawn from the consideration of the jury; and although the practice of admitting illegal evidence, and afterwards excluding it, is discountenanced, from its obvious tendency to work injustice, in consequence of the difficulty of eradicating from the minds of the jury the impression which the evidence may have made (Carlisle v. Hunley, 15 Ala.), yet, as the record shows a clear and unequivocal charge, excluding it from the consideration of the jury, however much we may condemn the practice, we cannot, under these circumstances, presume that any injury has been the result of its admission.

3. On the trial, the plaintiffs in error requested the court to charge, "that, if the jury believed from the evidence that undue influence was exercised on the part of any one of the legatees, and not as to the others, the will was void only as to those who participated in the fraud"; which was refused.

We were, at first, of the opinion that this charge should have been given; but more mature reflection has satisfied us, that there was no error in refusing it. We agree, that where a legacy has been given through undue influence, it does not necessarily have the effect of rendering the whole will void. It is in accordance with the dictates of reason, and the principles of natural justice, that fraud or undue importunity, on the part of one legatee, should not affect the other legacies which are the result of the free will of the testator. To this extent the authorities go.—Swinburne on Wills, 884; Trimlestown v. D'Alton, 1 Dow, N. S., 85. It is, however, equally clear, that if the fraud or undue influence on the part of one of the legatees affects the whole will, then no portion of it can stand.—1 Will. Ex. 39; Swin., Pt. 7, § 4, pl. 1. The charge, as requested, asserts the proposition, that, although the entire instrument may have been the result of undue influence on the part of one of the legatees, it is good as to all but the parties who exerted the influence. This proposition, as we have seen, cannot be sustained.

The correctness of the charge given by the court, that the will was void if it was the offspring of an insane delusion, existing at the time of its execution in the mind of the testator, as to Edward G. Florey being his son, depends, as we think, entirely upon the question, whether the evidence, as shown by the record, was of a character which would authorize the charge to be given. If there was any evidence, tending to show that Edward G. Florey was not, in fact, the son of the testator, and the belief that he was so was but the result of a mental delusion on his part, it was competent, however slight it may have been, to go to the jury; and it was their province, and theirs only, to determine the weight to which it was entitled. The testimony on this point tended to show, that while both the testator and his wife were white persons, Edward G. Florey was of mixed blood, and that he exhibited, plainly, the peculiar marks of the negro in his person—that his color was that of the mulatto, and his hair woolly. The physiological fact, that a white man cannot be the father of a mulatto child by a white woman, is, at the present day, as well settled as the opinion of scientific men can settle any question of that nature; and

we apprehend, that in cases of legitimacy, the presumption arising from a child being born in wedlock, might be rebutted by proof of this character. It follows, therefore, necessarily, upon these premises, that if the testator and his wife were white, and Edward G. Florey of negro blood, he could not have been their child—that the testator could not have been his father; and if his blood was clearly evidenced by the distinctive and peculiar marks of the negro, we think the belief of the testator, in opposition to this evidence, was admissible, for the purpose of showing delusion upon this particular subject. The belief, it is true, might have been the result of ignorance, rather than delusion; but so may a belief in witchcraft, and most other irrational or absurd opinions. Common observation and daily experience have fully demonstrated, that an irrational belief more frequently results from eccentricity, ignorance or association, than from insanity. Still, however, as irrationality is one of the results of derangement—one of the *indicia* by which it manifests itself—it follows, that either acts or opinions, which are in themselves irrational, are proper to be submitted to the jury, and are entitled to more or less weight according to circumstances. There are opinions so contrary to reason, that none but a person of unsound mind could entertain them; and, on the other hand, there are those which, although irrational, may be attributed to the causes we have before assigned, rather than to derangement; and in cases where the disease is not clearly and plainly marked, insanity, either partial or total, should not be predicated upon acts or opinions which may properly be referred to any other cause. If, however, partial insanity, or monomania, is established, and the will is the result of such insanity, the act is vitiated. This we understand to be the proposition asserted by the charge under consideration; and its correctness, as a legal proposition, has been considered as settled, since the judgment of Sir John Nichol in the case of Dew v. Clark, 3 Add. 79; S. C., 2 Eng. Eq. Rep. 436. But upon this point, also, we would limit our decision to the operation of the rule as applicable to the whole will. It may be, that where the derangement is partial, and its results are confined to but one portion of the will, the

provisions which are not at all affected by such derangement would be valid. This question, however, we do not consider as presented upon the record, and we do not wish to be understood as intimating an opinion upon it. The charge which was given by the court went to the will as a *whole*, and in that aspect it was unquestionably correct.

It results from the views we have expressed, that the judgment must be affirmed.

PINCKARD'S DISTRIBUTEES *vs.* PINCKARD'S ADMINISTRATORS.

1. The statute which authorizes the slaves and servants of which a decedent was possessed at the time of his death, and which were employed in making a crop, to be continued on the plantation in his occupation at the time of his death, until the last day of December following, embraces all the plantations belonging to him and cultivated by him at that time.
2. Under this statute an administrator is authorized to furnish the widow and children of the decedent with all things necessary to their comfortable support, according to their respective condition and wants; but he must keep an account against each, to be charged upon his respective distributive share; and such expenses only as are indispensable to the cultivation of the plantation, are a charge upon the estate, to be deducted from the proceeds of the crops.
3. The domestic servants employed about the household at the time of the decedent's death, may be allowed to remain with his family until the end of the year, for their use, free of charge; the town residence of the family, and the plantation a few miles distant, constitute but one establishment.
4. The decedent having died in February, after he had commenced planting, his administrator kept up the plantation during the year, and made a crop: He was held entitled, on final settlement, to a credit for his expenses in going to Montgomery to sell the cotton belonging to the estate.
5. Two day's services of an auctioneer, in selling the property of the estate, held a proper charge against the estate on final settlement.
6. An administrator is entitled to a credit for reasonable counsel fees paid for prosecuting and defending the interests of the estate.
7. Also, to reasonable counsel fees for services rendered on final settlement with the Probate Court, although exceptions were sustained to several items in his accounts and vouchers.
8. Expense of repairs to household furniture belonging to the estate is properly

allowed, when the value of the furniture is thereby increased to that extent.

9. Counsel fees paid for prosecuting the widow's right to dower, and her account for medical services rendered after her husband's death, are personal charges against her, and not against the estate.

10. Counsel fees paid for guardian *ad litem* for the minor heirs, are a personal charge against them, and not against the estate.

11. Five per cent. on the amount of the estate held a reasonable allowance to the administrator, where he had managed the plantation for nearly a year, and raised a crop; the value of the estate being about $25,000.

ERROR to the Court of Probate of Chambers.

ON the final settlement of the defendants' administration on the estate of Peyton Pinckard, deceased, the distributees objected to the allowance of several items in their accounts and vouchers; and their objections having been overruled, they excepted to the several rulings of the court against them, and now assign for error:

"1. The matters set forth in the bill of exceptions, as specified in the following items: 1st, in refusing to charge the administrators with the hire of negroes unaccounted for, to-wit: Lambert, Randall, woman Amy, girl Amy, and girl Julia, and twenty head of stock hogs unaccounted for; 2nd, in allowing vouchers presented by E. G. Richards, numbered 2, 9, 24, 26, 29, 30, 31, 32, 33, 34, 35, 43, 44; 3rd, in allowing vouchers presented by Carothers and wife, numbered 3, 8, 15, 20, 22, 25; 4th, in allowing commissions upon the aggregate amount of the estate, at the rate of five per cent.

"2. The court erred in rendering the decree: 1st, in the allowance of ten dollars paid to G. W. Gwinn, attorney's fee, for representing the guardian *ad litem* for the minor heirs; 2nd, in allowing the administrators the sum of $1182 48, it being five per cent. on the aggregate amount of said estate."

The evidence with regard to these items, as set out in the bill of exceptions and the decree of the court, is, in substance, as follows: The decedent died on the 2nd day of February, 1850; at the time of his death he resided, with his family, in the town of La Fayette, and had a plantation six miles distant in the county; he had employed an overseer for the year 1850, who was at that time on his plantation, preparing to make a crop; on the 11th day of March, 1850, letters of administration on the estate of said decedent were granted to Martha E.

Pinckard, the widow, and E. G. Richards. It was proved that the boy Lambert, who was a blacksmith, had been hired out by the decedent, for the year 1850, to a carriage-maker, for the sum of $175, on condition that he should be found to suit the business: the boy was in the hirer's possession, on trial, at the time of the decedent's death; but a few days afterwards he was returned to the widow, before letters of administration were granted on the estate; after the grant of letters of administration, the administrator, Richards, made several efforts to hire out said boy for the balance of the year, but failed; the boy was, however, hired out several times during the year, by the day, the sums received for such hire amounting to $92 47, with which the administrators charged themselves. On this proof, the court refused to charge the administrators with said sum of $175 for the hire of said boy.

It was shown, also, that the decedent had hired out the boy Randall, who was a blacksmith, for the year 1850, for the sum of $150, to one Cole, who was a carriage and wagon maker; but the hiring was on condition that the boy would suit him; said Cole took the boy on trial, and was to pay for the time he had him, if the boy did not suit; three days after the decedent's death Cole returned the boy to the widow, and gave her his note for $9 37 for the time he had kept him; the boy was then placed on the plantation, to do the smith's work, and was kept there during the remainder of the year; it was shown that the boy was worth about $15 per month to work at his trade, but was not worth so much on the farm. The administrators charged themselves with the amount of the hire received from Cole, and the court refused to charge them with said sum of $150.

The woman Amy was hired out by the widow, about the middle of February, for the balance of the year 1850, to one Callahan, for $45, for which sum he gave his note, payable to Richards, the administrator; said Amy became sickly in June, and proved to be pregnant, and thereupon said contract was rescinded, and the woman returned to the administrators, who kept her the balance of the year, during which time she gave birth to a likely child. The administrators charged themselves with the sum of $22 41, received from said Callahan for the hire of said woman, and the court refused to charge them with any further sum.

The girls Amy and Julia, who were employed about the house before the decedent's death, one as a nurse, and the other as a house girl, were kept in the family during the balance of the year; "it was further in evidence, that five other negroes were kept by the administratrix at the residence in town, of the following description: a cook woman, an old negro man about seventy years old who tended the garden, an old man who was unable to take care of himself, two small girls six or seven years old, and a small boy less than the girls; it was also shown that the decedent's family consisted of his wife and five children, the youngest being an infant. The court refused to charge the administrators with anything for the hire of Amy and Julia.

As to the twenty head of hogs unaccounted for, the proof was, that six or seven died during the year, and six or seven more were killed and eaten by the family; that previous to the sale, the overseer hunted up all he could find, and they were sold; and that the number returned in the inventory was about twenty more than were accounted for in the return of sales. The court refused to charge the administrators with the value of those which were missing.

Voucher No. 2 was a receipt for $12, paid by the administrator for four barrels of corn, which was purchased by him and used on the plantation; and the proof was, that there was no other corn on the plantation at the time of the purchase.

Voucher No. 9 was a receipt for $10 paid to one Towles, who was proved to be a superior salesman, for two days' services in selling the property of the estate.

Voucher No. 24 was for $12 70, money paid out by the administrator for travelling expenses to Montgomery, to sell the cotton belonging to the estate.

Voucher No. 26 was a receipt for $27 24, the amount of an account paid by the administrator; "it was in evidence that the items mentioned in said voucher were purchased by the administratrix, after the decease of Pinckard, for the use of the family, in the town of LaFayette, and that they were such articles as were usually purchased by families in like condition."

Voucher No. 29 is a receipt for $30 50, the amount of a store account for several articles of clothing; but the bill of exceptions does not state what evidence was offered in connection with it.

Voucher No. 30 is a receipt for $11 50 paid for three barrels of corn; and the evidence was, that one half of the corn was used on the plantation, and the other half by the family at their residence in town, and that they were out of corn at the time it was purchased.

Voucher No. 31 is a receipt for $19 61, the amount of a store account; and the evidence was, that the articles charged were such as are usually bought for negroes, and were applied to the use of the negroes at the residence in town and on the plantation.

Voucher No. 32 is a receipt for $71 92, the amount of a store account, some of the articles having been bought in the decedent's lifetime; and the evidence was, "that the articles purchased by the administrator, after the 2nd of February, 1850, were used for the white children and negroes, at the residence in the town of La Fayette, except the thread which was made into cloth for the use of the negroes."

Voucher No. 33 is a receipt for $83 07, the amount of an account for groceries; "the evidence was, that some bacon was sent to the plantation, for the use of the negroes, and the balance was used by the administratrix and the family in the town of La Fayette."

Voucher No. 34 is a receipted account for $80, for repairs on a barouche; and the evidence showed, that $80 was a reasonable price for said repairs, that the barouche was not worth more than $50 without them, and that it sold for $141.

Voucher No. 35 is a receipted account for $30 14; "the evidence was, that the articles were such as are usually purchased by families in like condition to that of the deceased, and were used by the family, and in clothing the negroes on the plantation; that the amount of clothing purchased was less than is usually found necessary to clothe the same number of negroes, and that the negroes were all well clothed when delivered to the heirs."

Voucher No. 39 does not appear in the bill of exceptions; but it is stated that "the evidence showed that Richards, the administrator, and Presley, his copartner, were attorneys, and that the amount charged was not more than a prudent administrator would have been authorized to pay for such services."

Voucher No. 43 is a receipted account for $125, paid to

Messrs. Richards & Presley, attorneys at law, for professional services rendered to the estate in an attachment suit at law and another suit in chancery; "the evidence was, that the attorneys performed the services, and that said services were necessary; that the fees charged were reasonable; that the services of a competent attorney or solicitor in chancery could not have been procured for less; and that the amount paid was such as a prudent administrator would have been authorized to pay."

Voucher No. 44 is an allowance of $25 to the administrator "for counsel fees on final settlement of said estate;" and it is stated that "there was no evidence in support of this voucher, further than the statement of the administrator, that, in consequence of the litigation by contestants, he was compelled to employ counsel, but for which it would have been unnecessary; that he had presented no such voucher on filing his account, but now asked allowance for said sum."

Of the vouchers presented by Carothers and wife, (Carothers having intermarried with the widow,) the first to which exception was taken is a receipted account for $6 45; and the evidence was, "that the articles were purchased by the administratrix after the death of Pinckard, and were used by the family of the deceased at the residence in the town of LaFayette." In support of voucher No. 8, the same evidence was given as in support of No. 3.

Voucher No. 15 was a receipted account for $61 75, for furniture and repairs, while "the evidence showed that the repairs increased the value of the property, and that all the articles were sold at the sale in their improved condition, and the administrators charged themselves with the amount said articles sold for."

Voucher No. 18 is a receipt for $4 00 paid for a barrel of flour, which was bought by the administratrix, and used by the family at their town residence.

Voucher No. 20 is a receipt for $6 00, for making mourning bonnet, dress, &c., for the widow.

Voucher No. 22 is a receipted account for $25, for printing 200 copies of "Appeal to the United Christian World;" it was in evidence that the contract for this printing was made by Mrs. Pinckard, in the lifetime of her husband; that the account was charged to her, and was never presented to said Pinckard in his lifetime.

Voucher No. 25 is a receipted account for $10, for medical services rendered to Mrs. Pinckard after the death of her husband, and the evidence showed that the services were rendered.

The court allowed all these accounts as charges against the estate, and the distributees excepted to the allowance of each item. The further sum of $10, paid to the attorney for the guardian *ad litem* of the minor heirs, was allowed; and the administrators were allowed, "for commissions and their trouble in superintending the estate," the sum of $1182 48, being five per cent. on the amount of the estate.

P. M. Allison and M. Andrews, for plaintiffs in error.

Richards & Falkner, *contra*.

PHELAN, J.—The correctness of several of the items in the accounts of the administrators, allowed them on final settlement, (see the statement of the case,) will depend upon the construction to be placed on the statute.—Clay's Dig., p. 196, § 19. That statute is in these words:

"If any person shall die after the first day of January, the servants and slaves of which he was possessed, &c., and which were employed in making a crop, shall be continued on the plantation in the occupation of the decedent at the time of his death, until the last day of December following, and then delivered to those who shall have a right to demand the same; and their crops shall be assets in the hands of the executors and administrators, subject to debts, legacies and distribution; the levies and taxes, their tools, the expense of feeding them and their families to that time, and delivering them well clothed, being first deducted."

Two questions arise here for our determination: 1st. Does this statute embrace any other than the plantation actually occupied as a residence by the decedent at the time of his death? 2d. Does it intend that the family at large of the decedent shall be supported out of the proceeds of the crops, or only the slaves, &c., engaged in making the crop?

We think the remedial nature of this statute requires that we should construe the words, "the plantation in the occupation of the decedent at the time of his death," to mean any plantation, and all the plantations, then belonging to him and culti-

vated by him. The main object evidently was, whenever a man died, who was engaged in planting, and who had made his plans and arrangements for the year, to let the business go on to the end of the year as he had projected it. This was supposed, no doubt, to be for the best interest of all concerned, and made the time for breaking up the plantation conformable to the general habits and customs of the country. This object, then, would embrace as well a plantation cultivated by him on which he did not reside, as one on which he did, and we must construe the statute accordingly; for both can be lawfully and properly said to be in his "occupation at the time of his death."

2. Was it the intention that the family of the decedent generally should be supported out of the proceeds of the plantation, or plantations, as the case may be, or only the slaves, stock, &c., indispensably necessary to the working of the crops?

The law evidently contemplates that the administrator should keep an account of *plantation expenses proper*, that is, such as are indispensable to its cultivation, and that this should be deducted from the proceeds of the crops, and the *net proceeds* only to be assets for distribution, &c. We think, however, that there can be no question that the law will justify an administrator in all such cases, (when the estate is not insolvent,) in furnishing the widow and children all things necessary to their comfortable support, according to their respective condition and wants, to the end of the year; but then he would be bound to keep an account against each, to be charged upon their respective distributive shares. Thus, bacon and corn for the plantation, negro clothing, &c., would be a charge upon the estate, to be deducted from the proceeds of the crops; but the subsistence of the family in town, the mourning suit for the widow, and the like, must be charged to the respective distributees for whose benefit the expense was incurred, and deducted from their respective distributive shares.

The decision of the court refusing to charge the administrators with the hire of slaves Lambert, Randall, and woman Amy, was correct, according to the proof. From this it appears, that they acted with reasonable care and prudence, and in good faith, in each instance; and it would not be proper to charge them with hire, as for a conversion. In the case of the woman Amy,

in all probability, the estate was benefited greatly beyond the value of her hire, by the course which was pursued.

Another question arises, as to the girls Amy and Julia, for whom hire is claimed. These, it is shown, were a part of the menial or domestic servants of Peyton Pinckard at the the time of his death: the one a nurse, and the other a house girl. There was six other slaves, old and young: a cook woman, an old man gardener, a very old helpless man, and three small children, composing the household slaves of decedent at the time of his death; and for these no claim is made. What does the statute intend with respect to the menial or domestic servants of the decedent? We think it is clear, that when a man who resides on his plantation, dies, the statute intends that the household or domestic servants shall be left, until the end of the year, with the family, for their use, as a part of the plantation. The words of the statute, "*servants* and *slaves*," clearly point to a distinction in the mind of the law-makers; and if this be not it, —the known distinction in slaveholding States between *household servants* and what we call *field hands*—then we can conceive of none in our country. But, if the law authorizes this when the party resides on his plantation, the interpretation which we have already given to the statute will extend the same privilege to his family, although they may reside a few miles distant, as in this instance; the family residence and the plantation a few miles distant being, for most purposes, with us, but one establishment. If, then, these were domestic servants, the law allows them to remain with the family of the decedent, until the end of the year, for their use, and without charge. The decrepit old negroes, and the helpless young, must have a home, as well as the white family, in our country; and the law must be supposed to have respect to the condition and wants, the duties and obligations, of both portions of our population.

As to the few stock hogs that were missing at the end of the year, the proof shows that they may have died, or been lawfully consumed by the family; the court properly refused to charge the administrators with them.

The expenses of the administrator, Richards, in going to Montgomery to make sale of the cotton, and the two days' services of the crier at the sale, were properly allowed.

The sums paid out for the services of legal counsel, in

defending the interests of the estate, having been shown to be necessary, and the charges themselves reasonable, were properly allowed.

There is one charge allowed the administrator for the assistance of counsel in conducting his settlement with the Probate Court. The allowance of counsel fees to the administrator, in such cases, must depend upon the circumstances of the case. If the administrator is met with exceptions to his account and vouchers, or to one or more important items, there seems to be no reason why he should be denied the assistance of legal counsel, even though the payment is to come out of that fund which is ultimately to go to his contestants. He is a trustee; and, if he acts in good faith, he should be protected. We see no other safe way, than to leave the allowance of counsel fees to the sound discretion of the probate judge, in such cases, (for the whole is transacted under his eye,) with the right in this court to control any exercise of such a power as may seem to call for it. We cannot see but that the allowance here was properly made. A great many exceptions were taken to the account and vouchers of the administrator, some of which have been sustained here; but upon the whole, it is evident that the administrators were in condition to need legal counsel and assistance fairly to discharge their trust. The charge seems to have been reasonable, and will therefore be allowed.—See Bendall's Adm'rs v. Bendall's Heirs, at this term.

The expense of repairs done to the barouche and to the furniture, which were afterwards sold, the court might allow, if satisfied from the proof that the value of the articles at the sale had been enhanced by these repairs to the full extent of such expense; and this seems to have been the case.

The sum paid out for printing two hundred copies of the "Appeal to the United Christian World," is not a proper charge against the estate. There is no satisfactory proof that it was done for, or with the approbation of, the decedent.

The counsel fees paid for prosecuting the right of dower of the widow, is a charge personal to herself; so, also, is her medical bill after the decease of her husband. The fee allowed for the attorney for the minor heirs, is a proper charge against them only.

Considering the extent of this estate, and that the plantation

was kept up and managed for nearly a whole year after the death of the intestate, we do not think the amount allowed the administrators, as "commissions" and for "their trouble," at all unreasonable. The usual rule of a per cent. on the receipts and disbursements only, would not meet the just demands of a case like this.

These observations, together with the general principle already laid down, which will be found applicable to most, if not all, of the vouchers not particularly noticed above, will be sufficient to guide the court below in the future progress of this case.

For the error in allowing such charges as are said above not to have been properly allowed, and for allowing the others in the form in which they were presented, the decree of the court below is reversed, and the cause remanded.

SLAUGHTER *vs.* CUNNINGHAM.

1. A transcript from the records of a foreign court, whether of general or special and limited jurisdiction, is admissible evidence in the courts of this State, if properly authenticated; and our courts are bound to presume that the foreign court had jurisdiction of the subject matter upon which it professes to adjudicate, until the contrary appears.
2. In detinue for a slave, the defendant introduced as a witness the father of his vendor, who testified, that he held an order on defendant from said vendor for the balance of the purchase money, which was to be paid at the termination of the suit, and that said vendor had given this order as a present to his mother, who was the wife of the witness: *Held*, that the witness was incompetent, from interest, to testify for defendant.
3. Where plaintiff claims as trustee for his grantor's children, under a deed made while said grantor was a minor, the defendant may show that the grantor disavowed the act after he became of age, and made another disposition of the property; and for this purpose, a deed of revocation and a bill of sale from the grantor to himself are admissible evidence.
4. A release from a stranger, or a transfer of all his interest in the property, is admissible evidence for the defendant in detinue, as tending to show title in himself.
5. Defendant claimed under a bill of sale from plaintiff's grantor, executed after he became of age, and said grantor derived his title from his grandfather's will, bequeathing the slave to him and his elder brother; plaintiff

introduced evidence tending to show a division of the slaves between the two brothers while the younger was a minor, and that the elder was satisfied with it: *Held*, that defendant might introduce rebutting evidence, showing that the elder brother was dissatisfied with the division, and that defendant had paid him for his claim to the slave in suit.

6. Where slaves are bequeathed to two brothers jointly, and after the elder becomes of age a division of them is made by him and his father, the latter acting for his infant son, the division is binding upon the minor until he dissents from it; and if he ratifies it, the elder brother cannot avoid it.

7. A deed of gift, executed by a minor in trust for his children, is not void, but voidable merely; and in a contest between the trustee and a subsequent purchaser from the grantor, the question of the disavowal of the gift should be left to the decision of the jury.

8. And if the minor acknowledge the deed in open court, this does not render it irrevocable, nor require that the revocation should be made in open court after notice to the parties; when the grantor retains possession, any act on his part after attaining his majority which shows to the world that he does not intend to be bound by his deed, is sufficient to revoke it.

ERROR to the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

DETINUE by Bryant Slaughter against William H. Cunningham, for a slave named Mary. The only plea was, the general issue, with leave to give any special matter in evidence. It appears from the bill of exceptions, that the plaintiff claimed title under a deed of gift from Champion T. Stallings to him as trustee, in trust for the benefit of the said grantor's daughter, then living and named in said deed, and such other children as he might have by his then present wife, whose maiden name was Mary L. Slaughter. This deed, dated August 7th, 1845, was executed while the grantor was a minor, and was by him acknowledged in open court, before the Hon. George W. Stone, at the Fall term, 1845, of the Circuit Court of Chambers. The plaintiff offered said deed in evidence, and proved that the slave was in said grantor's possession at the time of its execution; but it does not appear that any change of possession took place when said deed was executed or delivered.

For the purpose of showing title in himself, the defendent first offered in evidence a transcript of the records of the Court of Ordinary for Jasper County, Georgia, purporting to be a copy of the last will and testament of William Traylor, the grandfather of said Champion Stallings. This will contains the fol-

lowing clause: "Item, To my grandchildren, William J. Stallings and Champion T. Stallings, I give and bequeath a negro girl named Julia; also, two cows and calves, bed and furniture, bedstead, chest and spinning wheel; all of said property to remain in the family until the youngest child, Champion T. Stallings, becomes of age." Said will purports to bear date on the 2d day of November, 1826, and to have been proved in open court by the subscribing witnesses, on the 7th day of May, 1827. The action of the Court of Ordinary upon it is as follows:

"GEORGIA, Jasper County: } Court of Ordinary, May Term, 1827.

Personally came into open court the subscribing witnesses to the foregoing will (naming them), who depose and say, that they saw William Traylor sign, seal, publish and declare this instrument of writing to contain his true last will and testament, and at said time was of sound, disposing mind and memory.

Subscribed and sworn to, in open court, this 7th day of May, 1827. A. R. BUCHANAN, C. C. O. } GREEN D. BRANTLY, CHRISTOPHER DEADWILDER, PASCHAL TRAYLOR.

Registered 19th of May, 1827, A. R. BUCHANAN, C. C. O."

The authentication of the transcript is as follows.

"The State of Georgia, Jasper County: } I, Davis Lane, Clerk of the Court of Ordinary of Jasper County, in the State of Georgia, do hereby certify, that the above and foregoing is a true copy and transcript of the last will and testament of William Traylor, late of said county, deceased, together with the probate and registration of the same, as fully as the same is of record and on file in my office.

Given under my hand and the seal of my office, which is the seal of the said Court of Ordinary, at Montecello, in [*L. S.*] the County of Jasper, in the State of Georgia, on the second day of October, 1849.

DAVIS LANE, C. C. O.,
Jasper County, Georgia."

"The State of Georgia, Jasper County. } I, James M. Williams, one of the justices of the Inferior Court of the County of Jasper, in the State of Georgia, which said justices of the Inferior Court are the Court of Ordinary for said county,

and have, when sitting for ordinary purposes, original jurisdiction of all matters and things touching the probate of wills, the granting of letters testamentary thereon, the granting of letters of administration on estates intestate and other estates, and of letters of guardianship of the person and property of all orphans, illegitimate children, idiots, lunatics and insane persons, within the county, and the care of their estates, do hereby certify," &c., in the usual form as required by the act of Congress; and then follows this additional certificate: "And I do further certify, that there is no judge, chief justice, or presiding magistrate of said court; that the same is composed of five justices, each of whom have and exercise co-equal and co-ordinate powers and jurisdiction; all of which I, the said justice, do hereby certify," &c.

In connection with this transcript, the defendant offered in evidence certain statute laws of Georgia, which are not set out in the bill of exceptions. The plaintiff objected to said transcript going in evidence to the jury, and in support of his objection read certain statutes of Georgia, which are also omitted from the bill of exceptions. He objected to the transcript being read, first, because there was no proof by the record, or to the court, that said Traylor was dead; secondly, because it did not appear, from anything on the face of the proceeding, that said Court of Ordinary had jurisdiction to admit said will to record; thirdly, because it did not appear there was present, when said will was probated or admitted to record, the number of justices required by law. The court overruled all these objections, and admitted the transcript; and the plaintiff excepted.

The defendant then introduced as a witness one Jeremiah Stallings, the father of the said Champion, who testified, that said Champion was born on the 8th of March, 1826; that witness was present at the trade between defendant and said Champion for the negro now in suit, which took place in the last of July, or first of August, 1847, just before said Champion left, to join the United States army in Mexico as a volunteer; defendant had said slave in his possession at the time, and had had her since September or October, 1843; witness did not see the bill of sale executed, but saw a paper which they said was a bill of sale. On cross examination witness stated,

"that he held an order on defendant, which his son gave him, for whatever was coming to him, said Champion, on account of said sale, after deducting what he (Champion) owed defendant; this order was given to witness by his son, and the money was to be paid at the termination of the suit; his son had (*given ?*) this order, or its proceeds, as a present to his mother, the wife of witness, when he was about leaving for Mexico; witness did not know how much would be coming on it; it did not specify any amount, but there would be some amount coming on the order." On this state of facts, plaintiff moved to exclude the evidence of the witness, on the ground of interest; but the court overruled the motion, and plaintiff excepted.

The plaintiff then proved by said Stallings, on his further cross examination, "that in 1843 or 1844, after said William J. Stallings had come of age, witness, at the request of said William J., made a division of the negro woman Julia and her four children between his said two sons; that he gave to said William J. the three youngest children and $50 in money, and to Champion T. the woman Julia and her daughter Mary, who is the slave now sued for; that this division was as just and equal as he could make it; that said William J. was satisfied with it at the time, and took his negroes off home, (he being married and living by himself at the time,) and has never given them up, or brought them back for re-division, and that he has since sold them; witness was also satisfied with this division; said Champion was married after this division took place, but before he came of age; and the deed of gift under which plaintiff claims, was made after his marriage, and before he came of age."

The defendant then offered in evidence a deed or declaration of revocation, executed by said Champion T. on the 23d of March, 1847, specifically revoking the said deed of gift under which the plaintiff claimed. This deed was proved to have been executed on the day of its date. The plaintiff objected to its admission in evidence, "because it was an *ex parte* transaction, of which he had no notice, and because it was illegal and irrelevant evidence to show a revocation. The court overruled the objection, and allowed the deed to be read; to which plaintiff excepted."

The defendant then offered in evidence, after having proved

its execution by one of the subscribing witnesses, a bill of sale for the negro in suit, from said Champion to defendant, dated April 12, 1847; the consideration expressed therein being $500 in hand paid. On cross examination, this witness testified, "that said bill of sale was written by one of the defendant's counsel, and said deed of revocation was written by defendant himself; that all the consideration which defendant had paid for said slave, within his knowledge, was the sum of $16, which defendant assumed, some time in May, 1847, to pay one W. T. Wood on account of what said Champion owed him; that nothing was paid by defendant at the time said bill of sale was made; that nothing has been paid, within his knowledge, by defendant, since its execution, except said sum of $16. It was not shown that said Champion could read or write; neither did defendant prove that said several instruments were read to him before he signed them." The plaintiff objected to the admission of this deed in evidence, "as illegal, irrelevant and incompetent evidence to show a revocation of said deed of gift"; but the court admitted it, and plaintiff excepted.

The defendant then proved, and offered in evidence, an instrument in writing executed by William J. Stallings on the 12th of April, 1847, assigning and transferring all his interest in the slave to the defendant, for valuable consideration. "Plaintiff objected to this instrument going in evidence, as being illegal, irrelevant and incompetent proof for any purpose, under the facts now before the court. The court overruled the objection, and plaintiff excepted. This bill of sale was admitted by the court, on the ground that the proof tended to show, that, after the division of the property as above shown, said William J. had become dissatisfied with said division, and claimed something more, and that defendant paid him the sum of $55, the amount mentioned in said bill of sale, for his claim to the slave now sued for. This proof was also objected to by plaintiff; which objection was overruled, and plaintiff excepted. The defendant also proved by a witness, that, before the probate of the will of William Traylor, said Traylor was dead. Plaintiff objected to this evidence; but his objection was overruled, and he again excepted."

"On this state of facts, the court charged the jury, that, if they believed the deed of gift uuder which plaintiff claimed was

made by Champion Stallings, after his marriage, and after the birth of his first child, but before he came of age, and that the slave sued for was one of the children of the woman Julia, given to William J. and Champion T. Stallings by the will of William Traylor, then they must find for the defendant. To this charge plaintiff excepted, and asked the court to charge: 1. If Champion T. Stallings, after his marriage and the birth of his first child, and while he was in possession of the property named in the deed of gift, under the division made by his father as shown in evidence, but before he came of age, executed the said deed of gift, as shown in the evidence, and that the same was acknowledged in this court at Fall term, 1845, as shown in evidence, then said deed was valid and irrevocable. 2. That the deed of gift under which plaintiff claimed could not be revoked, except by appearing in open court, and making the act of revocation, as the acknowledgment of the execution of the deed had been, unless the defendant had shown actual notice to plaintiff of the revocation of this deed of gift in the manner shown in evidence. The court refused to give these charges, and plaintiff excepted."

The errors now assigned are, the several rulings of the court shown in the bill of exceptions.

White & Parsons, for plaintiff in error:

1. The transcript from the Court of Ordinary from Jasper County, Georgia, ought not to have been admitted as evidence. By the agreement of counsel, of record, any and all statutes of Georgia, found in Prince's Digest, were regarded as in evidence, and may now be regarded as inserted in the record. The Court of Ordinary, in Georgia, is a court of limited jurisdiction.—3 Ala. 670; McCartney v. Calhoun, 11 *ib.* 118. All such courts must show, on the face of their proceedings, the facts necessary to give them jurisdiction.—Com'mrs' Court of Talladega v. Thompson, 18 Ala. 694, and authorities there cited. That case was reversed, because the record did not "affirmatively show the jurisdiction of the court over the road." In the case at bar, the transcript does not show that a quorum of the justices who compose the court were present at the time the will was admitted to record. The paper is no record at all, for there is nothing to show that it was ever admitted to record in

Georgia; indeed, when we look at the statute, we must come to the conclusion that it never has been recorded.—Prince's Digest, p. 240, § 7. There must be a majority of the justices to hold the court on the first Monday in every month; but two or more may admit an executor to prove a will, though it cannot be admitted to record until a regular term.—*Ib.* There is nothing in the transcript to show, that William Traylor was dead at the time this paper was made. The proof made on this trial cannot aid the transcript; this fact is indispensable to the jurisdiction of the court.

2. Jeremiah Stallings was an incompetent witness: he was directly interested in sustaining the defendant's title to the slave, so that the money might be paid on the order in his wife's favor. A gift to his wife, was a gift to him.

3. The deed of William J. Stallings to defendant was inadmissible: it was the act of a third party, and should have been excluded.

4. The first charge given cannot be sustained: it relieves the defendant from making proof of the revocation of plaintiff's deed; this was indispensable.—17 Wend. 135, 136, and cases cited in opinion. It was, also, an erroneous construction of that clause of the will of Traylor which gives the slave Julia to his grandchildren. This provision was made for the benefit of Stallings' family; if he was willing to waive it, and William J. was satisfied with it, and was of age at the time of the division, there is no one to complain of it, unless Champion T. does. But he does not complain, but is satisfied with the division. William J. was of age at the time, and a married man; he has kept the slaves which he got by the division, and though he extorted something more from Cunningham, yet that cannot be to the injury of plaintiff. The case of Johnson v. Culbreath, 19 Ala. 348, does not apply to this. Moreover, Cunningham had admitted the title of Champion T. to be good, by purchasing from him: he was estopped from saying that it was not good.—Brown v. Ayers, 14 Johns. 224; Duncan v. Harder, 4 *ib.* 210; 6 *ib.* 36; 7 *ib.* 158. But the deed under which plaintiff claims was irrevocable. It was a provision for his children, which the law will sustain. An infant may marry, and may make a marriage settlement.—Kent's Com., 2 vol., pp. 76, 77, 243. Then why may he not provide for his offspring? It is a clear duty.

S. F. Rice and J. Falkner, *contra :*

1. The legal proposition asserted in the charge given by the court, is, that if the defendant, in an action of detinue, brought by a plaintiff who claims under one of two joint owners, does connect himself with the title through the other joint owner, he may avail himself of the rights which he has thus acquired, in bar of the action. This is sound law.—Wright v. Bennett, 3 Barb. Sup. Ct. Rep. 451; Bell v. Hogan, 1 Stew. R. 536; Miller v. Eatman, 11 Ala. R. 609. The defendant not only showed a conveyance from one of the joint owners (William Jesse Stallings), but also a conveyance from the other joint owner (Champion T. Stallings), who was the grantor of the plaintiff, and who conveyed to defendant a few days after he arrived at lawful age. The only claim of plaintiff was a voluntary deed, executed by said Champion T. Stallings during his infancy, unaccompanied by the possession of the property, which remained with said Champion until his conveyance to defendant. "On this state of facts" the charge given was clearly correct, for it must be construed with reference to the facts.

2. The defendant having a conveyance from said Champion (the grantor of plaintiff), made some few days after he arrived at lawful age, had the right to show, if he could, that the voluntary deed executed to the plaintiff by said Champion, during his minority, had been disaffirmed and revoked by him on his arrival at lawful age, or soon thereafter. For that purpose, the several instruments executed by said Champion, to-wit: the one dated 23d March, 1847, and the other dated 12th April, 1847, were competent evidence.—15 Ohio R. 192; 5 *ib.* 251; 7 Blackford's R. 442; 11 Johns. R. 541 (top page 601); 14 *ib.* 124; 10 Peters' R. 58; 15 Wendell's R. 631; 17 *ib.* 119.

3. The transcript from Georgia was properly certified—the certificate showing that there is no chief justice, &c.; and the statutes of Georgia also showing the same facts set forth in the certificate.—See White v. Strother, 11 Ala. 720; Huff. v. Campbell, 1 Stew. R. 19; Dozier v. Joyce, 8 Porter's R.

4. The grant of letters, or the probate of a will, is *prima facie* evidence of the death of the testator. But the death of the testator "before the probate of the will," was positively proved by a witness on the trial of this cause.

5. Both the charges asked were correctly refused. The first,

if given, would have rendered an explanation necessary.—Ross v. Ross, 20 Ala. Rep. Neither of these charges was authorized by the evidence, nor by the law.

GIBBONS, J.—There was no error in allowing the transcript from the records of the Court of Ordinary in Jasper County, Georgia, to be read in evidence to the jury. No objection was made to the authentication of the transcript, as not being in conformity to the requirements of the act of Congress upon that subject, but it was objected, 1st, that the record does not disclose the fact that William Traylor, whose will was proved, was dead; 2d, that it did not appear, from anything on the face of the proceedings, that said Court of Ordinary had jurisdiction to admit said will to record; and, 3dly, that it did not appear there was present, when said will was probated, the number of justices required by law. In support of these objections, the counsel for the plaintiff in error cite the case of the Commissioners' Court of Talladega v. Thompson, 18 Ala. 694, to the effect that the proceedings of a court of special, limited jurisdiction must show affirmatively, on their face, their jurisdiction over the subject matter, or their proceedings are void; and other decisions of this court to the same effect. That this is the correct view to take of the proceedings of courts of special, limited jurisdiction of this State, there can be no doubt. But, we apprehend, the question under consideration does not properly fall under the authority of this class of cases. The question here is, not directly as to the effect of the transcript offered in evidence as a decree, but whether it is competent to go to the jury as the record of a court of a sister State. In such cases, whether the record is of a court of general jurisdiction, or one of special and limited jurisdiction, courts of this State are bound to presume in their favor, to the extent that they have jurisdiction over the subject matter upon which they profess to adjudicate, until the contrary appears. This much our courts owe to the judicial proceedings of the sister States. The true rule, we apprehend, was laid down in the case of Dozier v. Joyce, 8 Porter 393, which was a case involving the admissibility of a record of the Court of Ordinary of South Carolina. The court in this case uses the following language: "The certificate and seal which gives verity to the record, establishes as well the

right of the court to adjudicate the matter contained therein (unless, indeed, the record itself discloses the want of jurisdiction), as that such facts were in truth adjudicated." This disposes of the whole of the objections raised to the transcript under consideration, and shows that the court ruled the law correctly in admitting it to the jury.

The court, in our opinion, erred in refusing to exclude the testimony of Jeremiah Stallings, as we think it apparent from his testimony that he had a direct interest in producing a verdict for the party who called upon him to testify. He stated, that he held an order from his son for the proceeds of the sale of the negro to the defendant, after deducting what was due the defendant by the said Champion T. Stallings, the son. It is true, he states, that the son had made a present of this order, or the proceeds thereof, to his mother; but she is the wife of the witness, and there is nothing in the facts disclosed that would negative the idea that the witness would have a right at least to the use of the money realized from the order, by virtue of his marital rights as husband. This is a clear and distinct interest in the event of the suit, as he states that the funds are to be paid over as soon as this suit is terminated. As every sale of personal chattels implies a warranty of title, the conclusion is inevitable, that, if the present suit goes against the defendant, neither the witness nor the mother of Champion T. Stallings gets any money on the order which he holds.

3. The deed or declaration of revocation, and the bill of sale by Champion T. Stallings, were both properly admitted in evidence, as tending to show a disavowal of the act or deed by which the plaintiff claims title. The evidence was, that this deed was made whilst Champion T. Stallings was a minor; and the defendant had a right to show, that, after he became of age, he disavowed the act, and made another disposition of the property. The bill of sale was also properly admitted, in order to show title in the defendant.

4. Neither was there any error in the admission of the release or transfer of claim of William J. Stallings to the defendant in evidence. This testimony tended to show title in the defendant, and for that purpose was good evidence in his favor. We will not now pretend to say, that it would not have been as effectual for defendant to have shown the outstanding right in a part of

the property in William J. Stallings, as shown by the will of Traylor; no such question is presented. As above remarked, it tended to show title in the defendant, and for that purpose was properly admitted. We see no estoppel in the facts of the present case, as disclosed by the proofs, that would prevent the defendant from deriving title from William J. Stallings, when sued by the present plaintiff.

5. The proof offered by the defendant, as to the claim set up by William J. Stallings, and of the money which he had paid for his claim, was proper, because it tended to show that no valid division had been made between the brothers, of the bequest under their grandfather's will, and, also, because it was in reply to proof brought out by the plaintiff, to the effect that a division had been made of the property, and that Wm. J. Stallings was satisfied with it.

6. The charge of the court, strictly considered, cannot be sustained. It is to the effect, that if the jury believe that the deed of gift, under which the plaintiff claims, was made by Champion T. Stallings whilst he was a minor, and that the slave in question was the issue of the negro named in the will of the grandfather, William Traylor, as a bequest to Wm. J. and Champion T. Stallings, then they must find for the defendant. This charge, thus constructed, excludes from the minds of the jury the idea of revocation, or disaffirmance of the deed by Champion T. Stallings, and also the consideration of the fact as to whether there had been a division of the property or not between the brothers Stallings, legatees under the will of Wm. Traylor. Concede, for the present, that it is the law that a plaintiff, in the action of detinue, must show in himself the entire legal title of the matter or thing sued for. In the present case, there eertainly was some testimony, tending to show a valid division of the legacy between the brothers, enough, in our opinion, to have warranted the court in having left the fact to the jury to determine whether such a division had or had not taken place. The division of those negroes between the brothers, by Wm. Stallings, acting for himself after he became of age, and Jeremiah Stallings, the father of Champion T., acting for the latter, then a minor, was such as, in our opinion, would be binding upon Champion, until he dissented from it, more especially if, after he became of age, he took possession of

the slaves set apart to him by the division, and assumed the sole management and control over them, as the proof tends to show. If he chose to ratify the acts of his father in his behalf, in the matter of the division, it was not for William J. Stallings to set it aside, as he was then twenty-one years of age, and acting for himself. It was, therefore, a matter of fact to be left to the jury, as to whether or not Champion T. Stallings ratified the division, which his father had made for him, with his brother, of the negroes named in the bequest. If he ratified it, then the legal title to the negro in question was in him; if he disavowed the division, then the legal title was in the two brothers jointly.

The same remarks apply to the deed of gift under which the plaintiff claims title. It was not void, but voidable merely. If it was disavowed by the grantor after he became of age, then it was void; but not otherwise. This fact should also have been left to the jury in the charge of the court.

There was no error in refusing either of the two charges requested by the plaintiff. These charges seem to assume, that there was something in the fact that the grantor appeared in open court and acknowledged the deed preparatory to its registry, which takes it out of the general rule which appertains generally to deeds executed by minors. In the first charge asked, it is assumed that the infant, so appearing in open court and acknowledging it, renders the act irrevocable; and, in the second, that if a revocation is possible, it must be done only by appearing in open court after notice to the parties. Such are not our views of the law, in either aspect of the case. It will be recollected, that there was no delivery of possession when this deed of gift was made; but, on the the contrary, the evidence tends to show that the possession remained with the grantor down to the time when he executed the bill of sale to the defendant. Any act, under such circumstances, on the part of the grantor, by which he shows to the world, after he becomes of age, that he does not intend to be bound by his deed, is all that the law requires to effect the revocation. The rule would be different, in some cases, if possession had passed with the deed. Then, if the object of the grant were land, an entry must be made, before ejectment would lie; and if a slave, by parity of reasoning, a demand, before trover

could be maintained. But where the possession remains with the grantor, until he becomes of lawful age, all he would have to do would be, to disavow the title set up under the deed, and hold the property adversely to all the world. The court, in taking the acknowledgment of the deed, does no judicial act which estops the parties, as in ordinary judgments with the suitors regularly before it. Its duties are entirely ministerial; and the infant appearing in open court to make the acknowledgment, could no more make the deed irrevocable, than if the deed had been acknowledged before a justice of the peace or notary public. In both cases, the acknowledgment is made in the mode prescribed by the statute; and the deed becomes, in the one case, by the act of acknowledgment, as irrevocable as in the other, and no more.

For the errors above noted, let the judgment of the court below be reversed, and cause remanded.

BUSH & CO. *vs.* JACKSON.

1. In assumpsit for a breach of warranty of the soundness of a slave, plaintiff offered in evidence the deposition of the physician who attended the slave in her last sickness, whose testimony tended to prove that she had died of chronic pneumonia, having never recovered from an attack of acute pneumonia which she had had before the sale; in answer to the interrogatory, "State anything else you may know which will benefit the plaintiff," the witness answered, "As further testimony in favor of the plaintiff, I offer the two following cases, as having a bearing on the case at bar," and proceeded to detail the history of two cases, which he had treated, of acute pneumonia becoming chronic: *Held*, that the answer was not admissible evidence.
2. Illegal evidence may be excluded, on motion, at any stage of the cause.

APPEAL from the Circuit Court of Pickens.
Tried before the Hon. JOHN E. MOORE.

E. W. PECK, for appellants.
ORMOND & NICOLSON, *contra.*

CHILTON, C. J.—The appellants sued Jackson in *assumpsit*, upon a warranty of soundness, contained in a bill of sale of a negro woman slave named Phebe.

Upon the trial, the appellants offered the deposition of a physician, Dr. Peebles, who attended the deceased slave in her last sickness, tending to prove that she died with chronic pneumonia, and that she had never recovered from an attack of acute pneumonia which she had anterior to the bill of sale.

After expressing his opinion very fully, the witness, in answer to the concluding interrogatory, "State anything else you may know which will benefit the plaintiff?" proceeds to give the history and symptoms of two cases of pneumonia, which he had treated, bearing some resemblance to the case of Phebe. This the court excluded; and the refusal of the court to permit it to go to the jury, is here assigned for error.

It cannot be controverted, that the opinion of medical men is evidence of the state of a patient whom they have treated, and, so far as the science will allow them to draw any reasonable or probable inference from the condition of the patient at the time they examined him, they may give their opinion as to the past condition of such patient. It is also very clear, that they may detail to the jury the facts upon which they predicate their opinion; but it does not follow, that the court is bound to allow them to go on and detail the history of the various cases which they may have treated, of patients afflicted with similar diseases. The physician, in the case before us, does not say that the cases of pneumonia, which he enumerates, form the predicate for his opinion previously expressed, in whole or in part. He says, the cases, of which he gives the history, are "in favor of the plaintiffs," and "have a bearing on the case of Phebe." How they are thus favorable—whether as furnishing evidence of the physician's experience, and a predicate for his previously expressed opinion, or as distinct original testimony—is not stated. It was the duty of the party offering the proof, so to connect it with the witness' opinion, if it could be so done, as to show that it constituted, in whole or in part, the basis for his conclusions. It is not permissible for this court to

indulge intendments adverse to the correctness of the ruling of the primary court. We must, therefore, consider it in the aspect in which the record presents it as showing two isolated cases of protracted pneumonia, and in this aspect it was improper; for it may be that they were badly managed, or that some peculiarity of the physical system, from accidental or constitutional causes, produced the result.

Neither was it necessary to move the exclusion of such proof before the trial. It is the duty of the court, in any stage of a cause, to exclude from the jury illegal proof.

Judgment affirmed.

SELF *vs.* KIRKLAND.

1. A garnishee answered, that he would have been indebted to the defendant in a larger amount than the plaintiff's judgment, but before the service of the garnishment one H., who held a note against said defendant for a larger sum than garnishee's debt, proposed to sell said note to garnishee, who consented to take it to the extent of his indebtedness to defendant, the amount of which was not then ascertained; that the note, which had been mislaid, was to be delivered to him when found, but nothing was said about an endorsement; that the note was endorsed and delivered to him after the service of the garnishment, the endorsement being antedated to correspond with the agreement: *Held*, that the plaintiff was entitled to judgment against the garnishee on this answer.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

JOB SELF, having obtained a judgment against one Lilly, caused a garnishment to issue against Kirkland, as his debtor. Kirkland answered as follows: "That at the time of the service of garnishment, to-wit: the latter part of May, 1852, he would have been indebted to said Lilly in the sum of $28 or $30, for blacksmith's work, but before the service of the garnishment one Wm. B. Hall, held a note against

the said Lilly, for more than garnishee's indebtedness to said Lilly, and proposed to sell said note to garnishee, who consented to take it to the extent of what he might be indebted to said Lilly on settlement, the amount of which indebtedness was not, at that time, ascertained or known; that Hall would have delivered the note at the time of the agreement, but that the note was mislaid, and he was unable to find it; that upon finding it, Hall endorsed it, and dated the endorsement back to the date of the agreement; at the time of the agreement nothing was said about endorsement, but that the note was to be delivered to the garnishee; that the note remained in the hands of said Hall, until after the service of the garnishment, when the same was handed to the garnishee, and then endorsed to him, which endorsement was made, in reality, after the service of the garnishment, and was dated back to the time of the first agreement."

On this answer, the plaintiff asked for a judgment against said Kirkland, for the amount of his judgment against said Lilly, which was about $20. This the court refused, and rendered a judgment discharging the garnishee. The plaintiff excepted to this ruling of the court, and he now assigns it for error.

GEO. W. GAYLE, for appellant.

WM. M. MURPHY, *contra.*

LIGON, J.—We have decided heretofore, that no judgment can be rendered against a garnishee on his answer, unless he distinctly confesses an indebtedness, or states facts from which an indebtedness to the defendant in the judgment at the time the garnishment was served upon him may be clearly inferred.—3 Por. 105; 1 Ala. 421; 3 Ala. 312.

We have also decided, that if the garnishee, after service of the writ of garnishment, is notified that the evidence of his indebtedness to the defendant in the judgment had been transferred to another before such service, he may state the fact in his answer, and it shall protect him from a judgment on the garnishment.—2 Ala. 117; 12 Ala. 594.

But it has never been held, that a garnishee may shield himself by claiming to hold a demand on the defendant in

the judgment, in which he had not the legal title at the time of the service of the writ of garnishment. Were this the law, it would lead to corrupt agreements between holders of specialties against insolvent defendants in execution, and the debtors of such defendants, by which executory agreements, made without consideration, before the service of garnishment, may be perfected afterwards, and thus defeat the *bona fide* judgment creditor in the collection of his demand.

In Bostwick & Kirkland v. Beach, 18 Ala. 80, we held, that a garnishee, who answered that he was indebted to the defendant in attachment, but that he was the owner of a note made by him to a third person for a larger amount, and which had been transferred by delivery to the garnishee before service of garnishment, was but an equitable holder of the note, and could not set it up against the debt for which he was summoned as garnishee.

We have also held, that no demand is subject to be recovered by writ of garnishment, on which the defendant in the judgment, who is also the creditor of garnishee, could not maintain debt, or *indebitatus assumpsit*.—20 Ala. 334 ; 11 *ib.* 273 ; 18 Ala. 80. The process of garnishment, in this State, is strictly a legal writ, and can only be resorted to in order to reach legal liabilities. This being the case, it would seem to follow, that when the garnishee seeks to exempt himself from liability on account of a claim which he holds against the defendant in the judgment, such claim, in order to protect him, must be a good legal set-off to his own indebtedness—such a set-off as he could have made available against his creditor, had the latter sued him, in his own name, on the day on which the writ of garnishment was served upon him. This, in our opinion, is the true test in such cases ; for the writ of garnishment is but the commencement of a suit at law against the garnishee, not, indeed, by the creditor with whom he contracted, but by one on whom our laws confer the right to bring such suit.—15 Ala. 183.

Let us try the indebtedness of the garnishee in this case by these rules. In his answer, he admits that, at the service of the garnishment, he was indebted to Lilly in a larger sum, (even if we take the lowest alternative sum which he names,) than Lilly owed to Self, and for which he now seeks

to charge Kirkland. Had the answer stopped at this point, there could be no question as to Self's right to a judgment against him. But he seeks to discharge himself by setting up, as an off-set against Lilly, a note due to one Hall, which he agreed to receive before the service of the garnishment, but which, in fact, never came to his hands, either by delivery or assignment, until after that event. Under these circumstances, was it a set-off in his hands? Waiving the suspicious circumstances which surround this transaction between Kirkland and Hall, as they are disclosed in the answer, such as the antedating of the assignment, the cautious manner in which Kirkland states his interest, his forbearing to say that he paid, or was to pay anything for it, unless it became available in his hands against his indebtedness to Lilly; waiving all this, we say, still he does not show that the legal title to the note was in him when the garnishment was served. At that time it had neither been delivered nor assigned to him, and, under our previous decisions, could not be an off-set in his hands against Lilly's demand in a direct suit between them.

We have frequently held, that an off-set, to avail the defendant in a suit at law, must be due and owned by him at the service of the writ in the suit in which it is pleaded.—White v. Word, adm'r, 22 Ala. R. 442; Harbin v. Levi, 6 *ib.* 399; Cox v. Cooper, 3 *ib.* 256. The answer, in this case, clearly shows that Kirkland had not the *legal interest* in the note to Hall when the garnishment was served upon him, and it no where appears that this note was *due* at that time; it could not, therefore, be allowed as an off-set in the hands of Kirkland.

The answer, when stripped of all that relates to the note of Hall, confesses an indebtedness to Lilly in the sum of $28 or $30, a larger amount than the judgment of Self v. Lilly; and we think the court below should have rendered judgment against Kirkland for the amount of Self's judgment against Lilly.

Let the judgment be reversed, and the cause remanded.

AMASON ET AL. *vs.* NASH, JUDGE &C.

1. Suit may be brought on an administration bond, at the option of the party injured by its breach, either in his own name, or in the name of the obligee for his use.
2. To debt on bond against an administrator and his sureties, "jointly and severally defendants plead fully administered;" to which the plaintiff "demurred in short by consent:" *Held*, that the plea was equivalent to a joint and several plea of *plene administravit*, and was good as to the sureties.
3. In debt on an administration bond, it is error to render judgment final, against the principal and his sureties, without the intervention of a jury.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. B. W. HUNTINGTON.

DEBT on an administration bond, in the name of Preston G. Nash, Judge of the Orphans' Court of Sumter, for the use of Warren Hooks and Cullen Hooks, against Georg e Amason and his sureties on his official bond as administrator of Thomas Amason, deceased. The declaration sets out the bond, and alleges the recovery of a judgment against said administrator by said Warren and Cullen Hooks, that a sufficiency of assets came to his hands, which were wasted, &c. The defendants demurred to the declaration, and their demurrer being overruled they "jointly and severally pleaded fully administered, with leave to give any special matter in evidence;" to which the plaintiff "demurred in short by consent." The demurrer was sustained; and the defendants declining to plead over, judgment final was rendered ageinst them for the amount of the judgment described in the declaration.

The errors assigned are: 1st, the overruling of the demurrer to the declaration; 2nd, the sustaining of the demurrer to the plea; 3rd, in rendering judgment final without the intervention of a jury.

T. REAVIS, for appellants:

1. The demurrer to the declaration should have been sustained, on the ground of a misjoinder of plaintiffs. The judge of the Orphans' Court should not have been joined, but the

action should have been in the names of Cullen and Warren Hooks alone.—Clay's Dig. 221, § 34. This question was not raised in the case of Perkins v. Moore, 16 Ala. 9. That case, therefore, is not an authority against the position now assumed.

2. The sureties of an administrator are not liable beyond the assets which come to his hands.—Clay's Dig. 228, § 34. The assets may be consumed in the payment of preferred debts: such as debts due for the last sickness, and funeral expenses of the intestate (Clay's Digest 192, § 2); debts due the State (Clay's Dig. 245, § 20); debts due for taxes (Clay's Dig. 566, § 52); and debts due by execution, which had acquired a lien on the assets in the lifetime of the intestate.—Collingsworth v. Horn, 4 Stew. & Port. 237; Caperton v. Martin, 5 Ala. 217; Boyd v. Dennis, 6 Ala. 55. The failure of the administrator to plead fully administered to the action in which the plaintiffs recovered their judgment against him, cannot prejudice his sureties.—Clay's Dig. 228, § 34. But they, when sued upon the administration bond, may plead that he had fully administered.—Randolph v. Singleton, 12 Smds. & Marsh. 439. Indeed, their right to plead this plea, results from their exemption from liability beyond the assets received by the administrator. The demurrer to their plea of *plene administravit* was, therefore, improperly sustained.

3. The sureties being only liable for the assets which came to the hands of the administrator, it was necessary for the plaintiffs to prove, and for a jury to find, that he had received a sufficiency to pay the plaintiffs' debt. The court, therefore, erred in rendering a final judgment without such proof, or the verdict of a jury.—Thompson v. Searcy, 6 Port. 393; Miller v. Gee, 4 Ala. 359; Dean v. Portis, 11 Ala. R. 104; Sims v. Nash, 1 How. Miss. R. 271; Cogan v. Duncan, 23 Miss. (Cushman, vol. 1), 274.

Belser & Rice, *contra*:

2. The words "fully administered" cannot be construed or held as a good plea to an action of debt against an administrator and his sureties, when the declaration sets forth the bond, the judgment recovered against the administrator, its non-payment, a sufficiency of assets to pay it, and the waste and conversion thereof, &c. There is no error in sustaining a demurrer to such

a plea. The administrator had no right to plead any such plea; and he and his co-defendants all joined in pleading these words "fully administered." The court was not bound to separate. Wells v. Vance, 8 Ala. 399.

3. The demurrer to such plea being sustained, and leave given to defendants to answer over, and they declining to answer over, although in court, and not demanding any trial by jury or any inquiry of damages by a jury, there was no error in rendering final judgment without the intervention of a jury. Such conduct on their part was a waiver of a reference of any question to a jury; and they cannot, in the Appellate Court, spring the objection that a jury did not come, as they did not make the objection below. It was not, however, necessary to call a jury.—McGehee v. Childress, 2 Stew. 506; Clay's Dig. 325, § 70; Holdipp v. Otway, 2 Saund. R. 107, note 2; 4 Am. Com. Law Cases, 108 and 109; 1 Littell's R. 211.

GOLDTHWAITE, J.—On the part of the appellant it is insisted, that the action should have been brought in the name of the injured party, and that, as it was brought in the name of the obligee for his use, the demurrer should have been sustained. The statute (Clay's Dig. 221, § 3), it is true, provides that the bond may be put in suit in the name of the party injured; but the word "may," as there used, is not imperative. The object of the statute was, simply to confer upon certain persons the privilege of suing in their own names; but it is a question in which no public right or interest is involved, or in which any third person has any claim *de jure*, that the power should be exercised. It is entirely discretionary with the parties to whom the privilege was extended, whether to avail themselves of it or not.—The Newburgh Turnpike Co. v. Miller, 5 Johns. Chan. R. 112; Malcolm v. Rogers, 5 Cow. 188; Perkins v. Moore, 16 Ala. 9.

But in overruling the demurrer to the pleas, the court erred. The pleas and demurrer were both in short; and if the parties see proper to adopt that mode of pleading, the language will be fairly and liberally interpreted.—Jackson v. Jackson, 7 Ala. 791. Under the influence of this rule, we regard the pleadings of the defendants as equivalent to joint and several pleas, that the administrator, the principal in the bond, had fully adminis-

tered the assets which came to his hands; and as the sureties were not liable beyond the assets (Clay's Dig. 228 § 34; Miller v. Gee, 4 Ala. 359; Dean v. Portis, 11 Ala. 104), it follows that, if he had fully administered them, it would be a good defence so far as the sureties were concerned. The court, therefore, erred in sustaining the demurrer to the several pleas of all of the defendants except George Amason.

The court also erred in rendering judgment final without the intervention of a jury. The bond alone was not the foundation of the action. To entitle the plaintiff below to a recovery against the sureties, it was necessary for him to establish a *devastavit* on the part of the administrator; and his recovery could not exceed that amount.—Miller v. Gee, *supra*; Dean v. Portis, *supra*.

The judgment is reversed, and the cause remanded.

CRESWELL AND MONETTE *vs.* THE COMM'RS' COURT OF GREENE Co.

1. Two distinct final orders or decrees of the Commissioners' Court, one establishing a road, and the other granting a license to keep a ferry, cannot be taken to the Circuit Court by one writ of *certiorari*, although the ferry is a part of the road.
2. To authorize any one to be made a party to proceedings before the Commissioners' Court for establishing a road, or granting a ferry license, he must have a private right, as an individual proprietor, which he can vindicate by suit; and the record must show his interest.

ERROR to the Circuit Court of Greene.

Tried before the Hon. ANDREW B. MOORE.

JOHN C. JOHNSON made application to the Commissioners' Court of Greene for the establishment of a road, and also for a ferry license; and both of his applications were granted. The order establishing the road is as follows:

"It appearing to the satisfaction of the court, that thirty

days' notice of the application, as required by law, have been given, after hearing the evidence and the argument of counsel, it is considered by the court, that said application be granted; that the report of the jury of review, appointed at the last term of the court, be, and the same is hereby, ratified and confirmed; and it is ordered by the court, that the road, as laid out and marked by said jury of review, be established as a public road: that is to say (here follows a description of the route designated, commencing on the east side of the Warrior River, and "running in a north-west direction to the said river at the mouth of Big Creek, *thence across* the river, and along the highest point on the west bank of said river to the steam mill of John C. Johnson," &c.); upon the following conditions and stipulations, that is to say, upon the said John C. Johnson entering into bond, with good security, payable to the judge of the Probate Court and his successors in office, in the sum of $10,000, conditioned to cut out said road and put it in good repair, to furnish twenty-five good hands ten days' each year for the next five years after said road is opened, to work on said road on the east side of the river in addition to the hands that may be appointed to said road, if necessary to keep said road in good repair, and to pay all damages which may be assessed to private individuals in consequence of the said road running over their lands."

The order granting the ferry license is as follows:

"This day came the parties by their attorneys, and it appearing to the satisfaction of the court that thirty days' notice, as required by the statute, has been regularly given, and after hearing the evidence and arguments of counsel, it is considered by the court, that John C. Johnson be, and he is hereby, authorized and permitted to keep a ferry across the Black Warrior River at the mouth of Big Creek, upon his entering into bond, with good security, in the sum of $15,000, conditioned according to law."

The plaintiffs in error, on their application, were made defendants to these proceedings, and obtained a *certiorari* after the final orders were made, removing them into the Circuit Court; suing out but one writ, and giving but one bond. The circuit judge dismissed the *certiorari*, holding that the record did not show such an interest in the petitioners as entitled them to sue it out. This judgment of the court is now assigned for error.

WM. P. WEBB and SYD. MOORE, for plaintiffs in error.

JOHN W. WOMACK, *contra.*

PHELAN, J.—This record contains two distinct final orders or decrees of the Commissioners' Court of Greene County, one establishing a public road, and the other granting to John C. Johnson license to keep a public ferry. They were brought up to the Circuit Court by one writ of *certiorari*, where a motion was made to dismiss the writ. This motion the Circuit Court granted, for two reasons. first, that two distinct decrees or judgments were united in one writ; and, secondly, because the petitioners for the writ, Creswell and Monette, were not shown by the record to have any such interest as would authorize them to be heard.

We consider both grounds well taken. There are two final judgments or decrees of the Commissioners' Court contained in this record, one for a road, and another granting a ferry license. Although the ferry may be intended to connect the two ends of this road, the action of the court upon the two matters was as distinct as if the ferry had been in a different part of the county. The Circuit Court, therefore, very properly dismissed the *certiorari* for this reason, and its judgment must be affirmed. 2 Stew. 169; 4 S. & P. 409; 6 Port. 208.

In the second place, we hold, that the interest which will authorize any one to be made a party to these proceedings in the Commissioners' Court, must be shown by the record, and must be an interest in property—something capable of individual ownership—and not a mere interest which the party holds in common with the rest of the community. It must relate to him separately as an individual proprietor, and exist as a private right, which he, as a private man, may vindicate by suit; for, if it be only a right which he holds in common with the rest of the community, it is a public right, and is not placed by the policy of the law in the keeping of any private individual.—There is an open mode for vindicating such rights, but this is not it. Although, therefore, this record discloses that Creswell and Monette were made parties to these proceedings, the record does not show that they had any interest, and of course fails to show that they had such an interest as would give them any right to be made parties. For this reason, also, the *certiorari*

should have been dismissed. On these points see 11 Ala. 245; 15 *ib.* 134; 18 *ib.* 694; 22 *ib.* 484.

We must here dismiss the case, without considering the main questions upon which our judgment is elicited, both by the argument and the assignment of errors; but we deem it most proper, as a general rule, not to hazard an opinion, when it is a mere opinion of the court on the question, and does not settle the law of the case.

Let the judgment of the Circuit Court be affirmed.

STEELE *vs.* MEALING.

1. A mortgage given to one surety, for his indemnity against a particular debt, enures to the benefit of his co-surety; and the mortgagee cannot apply the funds to any other debt than that specified in the mortgage, to the prejudice of his co-surety.
2. If the mortgage, in such case, contains a power of sale upon default being made in the payment of the debt, and the mortgagee, after the law day of the deed, permits the property to be levied on and sold by the sheriff, under execution against the mortgagor, he is chargeable, at the suit of his co-surety, with its value; but the latter must allege such neglect in his bill, or he cannot charge the mortgagee with it.
3. The mortgagor's cotton having been levied on, the mortgagee became surety on the replevy bond, and the cotton was delivered to the mortgagor, who shipped it to Mobile, where it was sold by the consignees, and the proceeds were applied by them to the part payment of a debt due to them by the mortgagor, on which the mortgagee was surety, and which was one of the debts secured by the mortgage: *Held*, that the mortgagee was not entitled to a credit for what he was compelled to pay on the replevy bond, as against his co-surety on the other mortgage debts.
4. When the mortgagee repudiates his trust, and compels his co-surety to file a bill against him to establish it and make him account, he is not entitled, on the taking of the account, to commissions for selling the property.

ERROR to the Chancery Court of Lowndes.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by Jonathan Mealing against David A.

Steele, for an account and contribution of a certain mortgage fund alleged to be in the defendant's hands and partly claimed by the complainant. The bill alleges, that said complainant and defendant, some time before the year 1845, became joint sureties of one A. Borland, on a note for $9004 14, held by the Branch Bank at Montgomery (but the record nowhere states the date of this note, or the time when it became payable); that said Borland, after this note had been given, executed a mortgage to said defendant, conveying to him a large tract of land and several negroes, more than enough to pay said debt, as an indemnity against his liability on account of said suretyship; that judgment was afterwards obtained against said complainant on said debt, and he has been compelled to pay one half of it, amounting to the sum of $5044 49; that the property conveyed by said mortgage was more than enough to pay said entire debt, and that defendant has realized, or ought to have realized from it, the amount of the debt. The bill alleges, that said mortgage enured to the benefit of complainant, as co-surety with defendant on said debt, and asks contribution and an account.

The mortgage, which is made an exhibit to the bill, purports to have been made for the purpose of securing the payment of a debt of about $1,400, due to said defendant from said Borland, and also to indemnify him against his suretyship on said note for $9004 14, on which complainant was co-surety with him, and on another note for about $3,100, held by Rives, Battle & Co. of Mobile; making the aggregate amount of the liabilities secured by the mortgage about $12,000. It gives the mortgagee full power to sell the property, after ten days' advertisement, on default being made in the payment of any of the secured debts.

The defendant answers the bill, denying, in the first place, his liability to account to complainant, because the security was made to himself and for his benefit, and insisting, in the second place, that, if the said mortgage enures to the benefit of complainant at all, it can only be available to him after defendant has been reimbursed all moneys which he has paid out for said Borland; that the account, taken in this way, would show a considerable balance in defendant's favor, and the complainant, therefore, would get nothing.

The case was brought to a hearing, and a decree of reference was made, in which the following principles, among others, were settled: 1. It is conceded, that a debtor, in making a mortgage to secure the payment of a debt, may expressly provide for the indemnity of one surety, to the exclusion of a co-surety; but such preference must be clear and palpable on the face of the paper, and will not be allowed when the intention to make it rests upon inference merely; that no such intention was expressed in the present case, and consequently none would be inferred. 2. That the defendant was a trustee for complainant, his co-surety, and was chargeable, therefore, as such, for any loss of the trust estate caused by his negligence or mismanagement. 3. That the defendant could not apply the mortgage property to any other debts than those specified in the mortgage, to the exclusion or prejudice of complainant's rights to the fund. 4. That all the debts specified in the mortgage stand upon an equal footing, including the debt due to the Bank, and all are to be paid *pro rata* out of the mortgage property.

The defendant also contended, that he was entitled to a credit of some $1400 on the trust fund, which was denied by the complainant. The facts in relation to this item, appear to be as follows: Borland had a quantity of cotton on hand, which he was about to ship to Mobile, when it was levied on by the sheriff of Lowndes, under an execution in his hands; the defendant became surety for Borland on a replevy bond for the forthcoming of the cotton, and the cotton was thereupon re-delivered to Borland, who shipped it to Mobile to Rives, Battle & Co.; the consignees sold the cotton, and applied the proceeds (about $2000) to the part payment of the said note for $3,100 which they held on said Borland, on which defendant was surety; the defendant was compelled to pay the execution under which the levy was made, amounting to about $1400, and he insists that this amount should be allowed him as a credit on the mortgage fund. The court intimated, in the decree of reference, an opinion against the allowance of this credit, but reserved the determination of the question until the final decree, and directed the master to report the facts specially in reference to this transaction. The final decree confirms the opinion previously intimated in the order of reference.

The master reported, that the fund produced from the mortgage property, for which the defendant was liable, amounted to $9598 10, which was to be applied *pro rata* to the several mortgage debts; and of this amount the complainant was entitled to $3733 66, which, with the interest thereon to the time of stating the account, amounted to the sum of $5288 83. To the account as stated by the master, the defendant took the following exceptions: 1st, that he should not have been charged with ten of the mortgage negroes, which were sold by the sheriff of Lowndes under executions junior to the date and record of the mortgage; 2nd, that he should not have been charged with four other negroes which were sold under similar circumstances; 3rd, that he ought to have been allowed, as a credit on the mortgage fund, the said sum of $1400, paid by him on account of said replevy bond, as above stated; 4th, that he was entitled to commissions for selling the mortgage property, which the master refused to allow him. These exceptions were all overruled, and the report confirmed; and a final decree was rendered accordingly.

The errors assigned are: 1st, the court erred in rendering the final decree; 2nd, in decreeing that the defendant should make contribution to the complainant; 3rd, in charging the defendant with the value of the mortgage slaves which were lost by want of diligence; 4th, in overruling the several exceptions to the master's report, and in confirming said report.

Watts, Judge & Jackson, for plaintiff in error:

1. The mortgage property was not conveyed for the payment of the debt; the conveyance is to Steele, for his own indemnity; Mealing takes no interest, unless there is a surplus after paying Steele what he has paid out.—Bell v. Lamkin, 1 Stew. & P. 460; Hodgson v. Hodgson, 2 Keene 704; Moore v. Moore, 4 Hawks 358; 2 Eq. Dig. 412, §§ 4 and 5.

2. But, if Steele is responsible to Mealing at all, it is only on the principle that equality is equity, or that co-sureties shall share in all indemnities received by either; and Mealing, therefore, at most, can only share in the fund actually realized from the mortgage property, and the defendant ought not to have been charged with the value of the negroes sold by the sheriff. Trustees are not responsible for losses, unless they are caused

by fraud or gross negligence. Steele had a larger interest than any other person, and of course would not be unmindful of it. Thompson v. Brown, 4 Johns. Ch. 627; Franklin v. Osgood, 14 *ib.* 560; 2 Eq. Dig. 407, § 18. The case of Steele v. Brown, 18 Ala. 700, is wholly unlike this case: there, Steele received the indemnity for the benefit of all. Steele had not paid any of the mortgage debts when the sheriff sold the negroes, and he could not reasonably be expected to assert his claim until he had been positively damaged. Besides, the facts disclosed by the master's report, show that these slaves were not lost, but were only sold subject to the mortgage.—Steele v. Adams, 21 Ala. 504.

3. When the cotton which was sold in Mobile, and applied to the payment of the debt to Rives, Battle & Co., was levied on by the sheriff, and a forthcoming bond taken, with Steele as surety, the legal right to the cotton was in him, Steele.—Langdon v. Brumby, 7 Ala. 54; Kemp & Buckey v. Porter, *ib.* 138. The forfeiture of the bond, and payment of the debt by Steele, only perfected the right, and gave him a priority over all other claimants.—Mills v. Williams, 2 Stew. and P. 390; Neff v. Miller, 8 Barr 347. Hence, the payment to Rives, Battle & Co. out of this cotton, on their debt secured by the mortgage, was a payment by Steele out of his own funds, as he had to pay the debt to the sheriff under which the cotton had been seized. Borland took the cotton to Mobile, with the intention of selling it and applying the proceeds to the execution which had been levied on it; but he failed to do so, and Steele had it to pay. Steele should be allowed the benefit of this payment on another ground: he who seeks equity must do equity, and it is certainly equitable and just that he should be allowed the benefit of it.

I. B. Stone and J. P. Saffold, *contra:*

1. That Mealing is entitled to contribution from Steele, is established by the following decisions of this court: Steele v. Brown, 18 Ala. 700; Pinkston v. Taliaferro, 9 Ala. 547; and 2 Story's Eq. Jur., § 499.

2. As to the claim for a credit of $1400 on account of the money paid on the replevy bond: The case of Mills v. Williams, 2 Stew. & P. 394, cited for plaintiff in error, has been

overruled by the case of Morrison, Givhan *et al.* v. Marvin, 6 Ala. 797. That case decides, that where even a surety pays a judgment upon execution, it is a satisfaction of the judgment; "the surety is not entitled to keep the execution open for his indemnity on paying the money." The authorities cited to show that Steele, by becoming a surety on the delivery bond, acquired a right to the cotton, simply show that the surety, as well as the principal, has a special interest in the property levied on, merely for the purpose of delivering it to the sheriff, and protecting it against junior levies and third persons; but if he suffers the defendant in execution to take the property and carry it off, he loses this right. The claim to this credit seems to be founded upon the idea, that by a fiction of law Steele shall be considered to have paid the money to Rives, Battle & Co. out of his private funds.

3. The claim for commissions for selling the property, is tantamount to a claim for commissions for attending to his own business: he sold the property for his own benefit, and not for Mealing, who is only incidentally benefited by it.

GIBBONS, J.—From the best examination that we have been able to give the record before us, we can perceive no error in the decree of the Chancellor below. The position is undeniable, that where a mortgage, or other security, is given to one of several sureties for his indemnity on any particular debt, it enures to the benefit of all the sureties to that debt.—1 Story's Eq. § 499; Steele v. Brown, 18 Ala. R. 700; Pinkston v. Taliafero, 9 Ala. 547; Bell v. Lamkin, 1 Stew. & P. 460. It is also equally clear, that where a mortgage is given to one of several sureties, for his indemnity against certain debts therein specified, such mortgagee cannot apply the mortgage funds to other debts than those specified in the mortgage, to the prejudice of the other sureties, to whose benefit the mortgage security enures.—*Vide* authorities above cited.

It is by no means so clear, that the defendant, Steele, is liable to be charged in the account for the fourteen slaves sold by the sheriff, Cole, on the ground that they were sold through the carelessness or gross negligence of the defendant. It is a fact somewhat singular, that we are unable to gather from the present record the time when the note, on which both the com-

plainant and defendant were sureties to the Branch Bank, matured. This fact appears in neither the bill, answers, nor proofs in the cause; and yet we consider it a fact material to the solution of the question, as to whether the defendant was guilty of negligence or not. If the sheriff had seized upon the mortgage property before the law day, the defendant could not have prevented a sale by the sheriff, unless he could have made out a case for equitable relief. In the absence of such an equitable case, the sale would necessarily have to be submitted to, subject, however, to the rights of the mortgagee. But it must be recollected, that the mortgage to the defendant contains a very ample power of sale, authorizing him to sell without any application whatever to any court for leave, upon short notice, on any default in the payment of any of the mortgage debts. If, therefore, after such default, or, in other words, if after the law day of the mortgage the defendant has slept upon his rights, and permitted the property to pass from his possession and control, when he had the power to realize from it by simply putting it up for sale, we could not hesitate to pronounce it such an act of negligence, as, between him and his co-surety, would charge him with the value of these slaves.

But we are precluded, in the present state of the record, from prosecuting our inquiries upon this branch of the master's report, as we find, on a careful examination of the bill and answer, that it is entirely outside of the pleadings in the case. We find no allegation whatever in the bill of gross negligence, nor any charge of want of diligence in managing the mortgage property; and in the absence of such an allegation, it was erroneous in the Chancellor to have allowed this item in the account. —*Vide* Ansley v. Robinson, 16 Ala. 793; Graham v. Tankersley, 15 Ala. 634. But the defendant contends, that, even supposing that he is liable to account to the plaintiff, he is entitled to have allowed the sum of $1400, which he paid on the judgment under which the cotton of Borland was levied on, and afterwards sold in Mobile by Rives, Battle & Co., and applied towards the payment of the note of $3,100, which they held against Borland, and on which said Steele was surety. In the master's report, the $2000 for which the cotton was sold was considered by the master as a payment on the note by Borland, and consequently, that note was credited with that amount, and

the balance only allowed to Steele as a charge against the mortgage fund; whereas, Steele contends, that notwithstanding this was paid by Borland, or by his cotton, yet, as he was the means of sending the cotton to that house, by means of his replevy bond on taking the same from the hands of the sheriff, and inasmuch as, in consequence of such interference on his part and such replevy bond, he had the sum of $1400 more to pay, therefore he ought to be allowed this $1400, as a credit to him, or a charge in his favor upon the mortgage funds.

This proposition, however plausible in its statement, we do not think sound. The proposition would be much more tenable, if the facts had shown that the liability on the replevy bond was incurred for the purpose of sending the cotton to Rives, Battle & Co., to be applied as they afterwards applied it, Whether or not, in that case, the position of the defendant could be maintained, we do not now decide. But the facts tend to show, that the liability incurred on the replevy bond for the cotton was a more friendly act on the part of Steele, to prevent a sacrifice of the cotton, and he permitted Borland to take the same to Mobile, with a view of converting it into money, with which to pay off the very debt which Steele was afterwards compelled to pay; but the death of Borland, and the application of the funds by Rives, Pattle & Co., without the direction of any body, to the payment of the note which they held against Borland and Steele, show that the liability incurred by Steele was one in addition to the former liabilities already existing on account of the said Borland without any reference whatever to the mortgage security; and on no principle of equity, ought he, in our opinion, to be permitted to bring in this additional liability, thus created, to share *pro rata* in the mortgage fund, to the prejudice of the complainant.

Nor do we think the court below erred in refusing to the defendant commissions for selling the property. He certainly was entitled to be reimbursed for all of the expenses which he had incurred in executing the trust, or in realizing from the mortgage; but, where, as in the present case, the very character of trustee is denied by the defendant, and the complainant is compelled to bring him into court to fix that character upon him, even if under other circumstances he would have been entitled to commissions, the bad faith on his part would work a for-

feiture of such compensation. As to whether a trustee, such as the mortgage security rendered the defendant, would, in any case, be entitled to commissions by way of a per centage allowance, acting in good faith, we decide nothing, as that question is not presented.

For the error above noted, in charging the defendant with the slaves lost by his gross negligence, the decree of the Chancellor is reversed, and the cause remanded; with leave to the complainant so to amend his bill, as to enable him to embrace the question of care and diligence on the part of the defendant in managing the mortgage property, if he choose so to do; and the defendant in error must pay the costs of this court.

SAVAGE & DARRINGTON *vs.* WALSH & EMANUEL.

1. When one defendant wishes to revise a judgment rendered against himself jointly with others, he has the right to use their names for this purpose; but, if they are unwilling to join in assigning errors, they must be summoned after the case comes to the Supreme Court; and on their failure to join after such summons, an order of severance is granted, and the appellant then prosecutes his appeal separately.
2. And if the appellant in such case dies, having given bond with security to supersede the judgment, the suit may be revived in the name of his personal representative.

APPEAL from the Circuit Court of Clarke.

MOTION to abate the appeal, for causes stated in the opinion.

F. S. BLOUNT, for the motion.

R. C. TORREY, *contra.*

CHILTON, C. J.—The judgment in the court below was against James Savage and Darrington. Savage alone sued out the appeal, and gave bond with security, as required by the statute, to supersede the judgment. After the cause was

brought to this court, Savage died; and the motion now is, that the suit abate by reason of his death.

The rule which has long been established and recognized by this court, is, that where there are several defendants to a judgment in the court below, some one or more of whom desire to revise the judgment in a higher tribunal, and the others are unwilling to join them, the party wishing to take the case up has the right to do so, and to use the name of all the defendants for this purpose; but, if the other parties are unwilling to join in assigning errors, they must be summoned after the case comes to this court, and, on their failure to join after such summons, there is an order of severance, and the writ of error is then prosecuted by the plaintiffs separately.—1 S. & P. 253. Since, by the Code, appeals are made to supersede writs of error in civil cases, we see no reason why the same rule of practice should not obtain.

As to the objection that the suit cannot be revived in the name of the administrator of James Savage, the appellant, who has died since he sued out the appeal, we think it cannot be supported: the statutes expressly provide for such cases.

Nor does the fact that an appeal bond was executed, make any difference. It is settled, that should there be an affirmance after the suit is revived, the judgment would be rendered against all the parties, but as against the administrator, to be levied *de bonis intestatis*, and as against the securities of their own proper goods, &c.—Bancroft, adm'r, &c., *et al.*, v. Stanton, 7 Ala. 351.

Our opinion, therefore, is, that the suit in this court may well be revived in the name of the appellant's personal representative; that after he is made a party, and the suit revived in his name, Darrington be summoned to join in the assignment of error, and, on his failure to do so, the administrator proceed on his separate assignment.

Motion denied.

BENDALL'S DISTRIBUTEES *vs.* BENDALL'S ADM'R.

1. The allowance to an administrator of a credit for the cost of a tombstone erected over the deceased, must depend, in each case, upon the value of the estate and the desire of the deceased, as expressed by him orally or in his will. In a case where the estate amounted to about $8,000, and was bequeathed to collateral relations, the testator leaving neither widow nor children, the administrator was allowed a credit for $210, the cost of a marble tombstone, for which the testator had expressed a wish.
2. An administrator is not entitled on final settlement to a credit for counsel fees and cost paid by him in a chancery suit, (which he had instituted against the legatees to restrain them from proceedings in the Court of Probate to compel a partial settlement of his administration,) his bill having been dismissed for want of equity.
3. An administrator placed certain notes in the hands of his law partner for collection, who collected some of them by due course of law, filled up writs in other cases, (but never issued them, or docketed the cases in court,) and received the money from the debtors in all the other cases without suit. The court allowed him a credit for two and a half per cent. on the entire amount collected, for commissions paid to the attorney, and *it was held* no error of which the distributees could complain.
4. An administrator rightly allowed (*in this case*) a credit for $150, the amount of counsel fees paid by him to two attorneys for services rendered on his final settlement; the value of the estate being about $8,000, and the distributees contesting many of his accounts and vouchers, some of which were rejected.
5. Also, to five per cent. on the amount of his receipts as commissions, no wilful default or gross negligence being proved against him.
6. If an administrator wishes to discharge himself from the payment of interest, he should make the affidavit required by the statute when his account is stated by the court on the day of settlement; if the distributees are taken by surprise, the court may continue the cause, to give them an opportunity to examine into the facts and contest the affidavit.
7. The stating of an administrator's accounts is the act of the court; and to enable the Supreme Court to determine whether there was error in allowing any particular item, the bill of exceptions must set out all the evidence in relation to it which was before the primary court.
8. A testator bequeathed to his brother one-sixth part of the net proceeds of his estate, "to him and his heirs forever;" one-sixth to one of his sisters, "to her and her heirs forever;" one-sixth to the only daughter of a deceased sister, "to her and her heirs forever;" one-sixth to the five children of another deceased sister, "to them and their children forever;" one-sixth to another sister, "to her and her bodily heirs forever;" and one-sixth to the five children of his brother by his first wife, "to them and their heirs forever;" and the residue was "to be equally divided between my [his] heirs

heretofore named in the six separate divisions:" *Held*, that the legacies to the two sisters and brothers, they having died before the testator, lapsed, and went to the next of kin under the statute of distribution.

ERROR to the Court of Probate of Madison.

ON the final settlement of the estate of Jesse Bendall, deceased, by William H. Moore, his administrator, the legatees and distributees excepted to several rulings of the court, which they now assign for error. All these exceptions will be readily understood from the opinion. In relation, however, to the third exception, as to commissions paid B. T. Moore, an attorney at law, for collections, it should be stated, that the bill of exceptions expressly declares that the evidence therein set out "was all the evidence offered on this issue."

The testator, after directing his just debts to be paid, bequeaths to his brother, Isaac Bendall, several articles of inconsiderable value and one-sixth part of the net proceeds of his estate in money, "to him and his heirs forever;" to his sister, Sally Anderson, "one-sixth part of the net proceeds that is not given away to others, to her and her heirs forever;" one-sixth to the only daughter of a deceased sister, Elizabeth Zills, "to her and her heirs forever;" one-sixth to the five children of another deceased sister, Judith Adams, "to them and their children forever, to be divided into five parts first only, and paid to each of them;" one-sixth to his sister, Barbary Jones, "to her and her bodily heirs forever;" and one-sixth to his said brother's (Isaac Bendall) five children by his first wife. The residuary clause is as follows: "I now leave all the remainder of my estate that is not heretofore given away, in cash and accounts, in the hands of my executors, to carry on my law suits, if there should be any, and all other business belonging to my estate unsettled, and their expenses to be borne out of the same money, if there should be enough; and the net proceeds, after making a complete settlement, is to be equally divided between my heirs heretofore named in the six separate divisions, by my executors hereinafter named." Isaac Bendall, Sally Anderson and Barbary Jones having died in the testator's lifetime, the court held, that their legacies lapsed, and went to the next of kin under the statute of distribution.

C. C. Clay, Jr., and J. W. Clay, for plaintiffs in error:

1. The credit for moneys expended about the tombstone is unsustained by the will or bylaw. If an administrator is not allowed a credit for mourning apparel, or other clothing furnished the widow and children of a deceased man, by how much stronger reason should the credit claimed be disallowed?—Willis' Adm'r v. Heirs of Willis, 9 Ala. 334; Griswold v. Chandler, 5 N. H. 492. An administrator is limited, in his expenditures of the money of the estate, to its appropriate business—to the purchase of necessary articles that actually come to the use of the estate, or to payment for necessary services rendered it; and this he must show affirmatively.—Savage v. Benham, 11 Ala. 55, 56; Phillips' Adm'r v. Thompson and Wife, 9 Porter 667. But if such a credit is allowable, it ought to be regulated by the station of the deceased in his lifetime, his style of living, and the size of his estate. The credits here claimed and allowed amount to $210 88—nearly 4 per cent. on the distributable assets of the estate. No evidence was offered in support of the credits, save the declarations of the testator, which were objected to, and were clearly inadmissible; and, if admissible, they did not support the charge against the estate. If an administrator may exercise his discretion, or indulge his taste in such expenditures, he might exhaust the assets of the estate in erecting a statue or a mausoleum.

2. It has been expressly decided in Pennsylvania and South Carolina, that an administrator should not be allowed counsel fees on the settlement of his accounts, in a contest with the legatees.—Heister's Appeal, 7 Barr (Penn. R.) 455, 459; Villard v. Robert, 1 Strobh. Equity R. 393, 409. And where an administrator neglects to settle or pay, and is sued by creditors, or cited by heirs, and employs counsel to defend him, his counsel fees are not allowed.—Sterrett's Appeal, 2 Penn. 420; 2 Williams' Ex'rs, 1141, note 1; North's Probate Court, 171. And according to the decisions of our own court, to entitle him to credit for counsel fees, he should show that the services were required, the litigation necessary and *bona fide* for the benefit and demanded by the necessities of the estate.—9 Ala. 900; *ib.* 737; 16 *ib.* 286; 8 *ib.* 799. The suit in chancery was against the legatees, for the personal benefit of the administrator, and not demanded by the necessities of the estate, or in-

tended for its benefit. The bill, too, was dismissed on demurrer, and the administrator taxed with costs *de bonis propriis*. 12 Ala. 58. The contest in the Probate Court was between the administrator and legatees, and the latter succeeded in reducing his credits by $297 11, as the account shows. It is not only contrary to law, but to reason and justice, that legatees should be made to pay him for resisting their endeavors to extort from him their legacies, and for expenditures of their money for his personal benefit. The probate judge endeavored to compromise the difference between the legatees and administrator, by allowing him credits for half the counsel fees paid for prosecuting the chancery suit and maintaining his account on final settlement, and all the costs of the chancery suit. But, we can conceive of no mode of reasoning, consistent with law, equity or common sense, by which any compensation to the attorneys in either court, or the costs of the chancery suit, should be allowed. It is paying the administrator for abusing his trust, wasting the assets, and wronging the legatees. The only testimony in support of the counsel fees and costs in chancery, was that of one of the solicitors employed by the administrator, that he "had in good faith advised the filing of said bill;" whether for the benefit of the estate, the deponent saith not.

The allowance of commissions at 2½ per cent. for payments to B. T. Moore for collecting the debts due the estate, by the same rule of compromise, is equally indefensible. It appears that he was the brother and partner in the practice of law of the administrator; but he *alone* collects all the debts due the estate—amounting to near $7,000—without suing for more than $740 thereof, and without going out of the county, so far as appears from the evidence, without any effort other than filing two or three writs that never passed into the sheriff's hands and never were filed in court. There was no proof that his services were *necessary*, or that the administrator could not collect in the same manner. The general rule is, that he must collect the debts himself.—2 Williams' Ex'rs 1140. There was no evidence offered in support of the credits for counsel fees on the final settlement.

3. It is admitted as a general rule, that an administrator is entitled to the court costs attending his administration, as well as costs of suits instituted by or against him, as administrator.

But it must be *bona fide* litigation, (9 Ala. 737,) such as he was led into by the necessities or interests of the estate.—16 Ala. 228. Costs should not be allowed, where he misbehaves, or is negligent.—2 Lomax on Ex'rs 501; 2 Wms. on Ex'rs 1253; 16 Ala. 228. Or where his misconduct is the sole cause of litigation (2 Wms. on Ex'rs 1255); or where he necessarily protracts controversy.–8 Ala. 805. Does not the record fully sustain the objection to allowing the administrator costs, made before the probate judge? Does it not show misbehavior, negligence and needless litigation, unnecessarily protracted?—by the numerous citations and the rule *nisi* for an attachment served on him to compel a settlement; by his appeal to the Chancellor to restrain the legatees from compelling him to settle; by neglecting to ascertain the names of those entitled to distribution (as he admits he might have done, in his own bill for injunction); by not filing a list of the distributees till the day of the decree against him for distribution, although advised by the affidavit of his predecessor, the first administrator, and by the petition of the distributees filed years before his final settlement (as is shown in his bill for injunction), who they were; by deferring even a partial settlement and distribution, and never coming to a settlement until compelled nearly five years after the grant of letters to him; by paying his brother and partner in the practice of law five per cent. commissions for collecting in the same county with him, without suit, nearly all the debts and distributable assets of the estate; by wasting the assets in needless litigation; by imposing on the counsel of said legatees the task devolved on him by law of procuring a list of the heirs, and never filing a list of the heirs till the very day of settlement; by filing an account that does not in many items distinguish the principal and interest collected, or show when collected, and that disables the legatees from learning when and how the moneys were paid him. At all events, costs for citations, the rule *nisi*, and the cost in chancery, should not have been allowed. It was like paying him for his delinquencies.

4. Executors and administrators are entitled to just and reasonable compensation; but what that is, depends on the circumstances of each particular case.—7 Ala. 617; 9 Porter 667. Compensation may be refused in cases of wilful default or gross negligence, causing loss to the estate.—10 Ala. 914.

We think there is abundant proof of such default, negligence and injury to the estate in this record, as above set forth.

5. *Prima facie*, an administrator is chargeable with interest. He may discharge himself, "on making his returns to court," by expressly denying, on oath, that he has applied the funds of the estate to his own use.—Clay's Dig. 198 § 28. The reason why he should make the oath "on making his returns," is, that distributees may have notice and come prepared to contest its truth. But, when allowed to make the oath pending the contest, they are surprised and unprepared. But, notwithstanding he make the oath, he should be charged with interest, when guilty of *laches*.—10 Ala. 914. His first duty is, to be ready with his accounts, and neglect in this respect is good ground for charging him with interest.—1 Jac. & W. 140. So, when guilty of such acts of negligence or wrong administration as will disappoint claimants and dissipate assets.—10 Yerger 160. The statute was not intended to protect an administrator in resisting a settlement of his accounts for years and keeping the money of the estate lying idle all the time—by swearing he did not use it. Such is this case, as the account will show; although interest is charged on some items up to a few months before settlement—on the larger number and those of largest amount, no interest is charged for years before settlement.

6. The Probate Court distributed the legacies to Isaac Bendall, Sally Anderson and Barbary Jones (all of whom died in testator's lifetime) as *lapsed* legacies. The will clearly shows, that the testator intended that they should not lapse, but that in case any brother or sister died, his or her children should have his or her share. That such was his intention, is shown by his giving one-sixth of his property to Polly Zills, daughter of Elizabeth Zills, his sister, who died before the execution of his will, and by his carefully embracing the heirs of each living brother and sister in the respective items in which he bestows legacies on such brother and sister. He says. "I give to my brother, Isaac Bendall, one-sixth part of the net proceeds of my estate in money, "to him and his heirs forever;" to my sister, Sally Anderson, "one-sixth part to her and her heirs forever;" to my sister, Barbary Jones, "one-sixth part to her and her bodily heirs forever." He manifests a purpose to divide his estate equally among his brothers and sisters, or their lineal

representatives, according to our statute of distributions. He makes an exception in favor of Isaac Bendall's children by his first wife, given them an equal share with any brother or sister; probably, from extraordinary affection for them, or the apprehension that what he gave his brother would go to his younger children by a second wife, to the exclusion of the others, through her influence. Even this exception shows his intention that the children of each brother and sister should enjoy his or her share of his property. Then, in the 13th item, he says: "The net proceeds, after making a complete settlement, is to be equally divided between my heirs heretofore named in the six separate divisions, by my executors." There can be no doubt that he never intended any legacy to lapse, but that the children of each brother and sister (who might die) should receive their deceased parent's share. By this construction, the property of the entire estate will be distributed as it would have been if there had been no will, (except the one-sixth given Isaac Bendall's children by his first wife), and thus the intention of the testator made to harmonize with the law in case of intestacy. Again; by this construction equality and justice will be maintained; while, by that of the probate judge, the fortunate children of those parents, who survived the testator, not only receive their parent's share, but divide with the children of parents, who died before the testator, their parent's share.

The intention of testator is the law of devises; the will must be favorably and benignly expounded to carry out, if possible, the intention; and so rigidly is this rule enforced, that intention will sometimes prevail against the literal meaning of the words, and courts will even supply or reject words; and the general rule, that a legacy to one, who dies before testator, lapses, may be controlled by the manifest intention of the testator, that the legacy shall not lapse.—Ram on Wills 1, (8 Law Lib.); 2 Williams on Ex'rs, 794, 760; 8 Port. 197. The intention is gathered from the whole will, and the intention of one devise may be explained by another devise in the same will.—Ram on Wills 93; Cook *et al.* v. Holmes, 11 Mass. 528; 8 Port. 387; 21 Ala. 466.

Brickell & Cabaniss, *contra.*

LIGON, J.—On the settlement of the estate of Jesse Bendall, deceased, as appears by a bill of exceptions in this record, the legatees took several exceptions to the ruling of the court in relation to items of the account current of the administrator with the will annexed, as it was stated and allowed by the court. These exceptions we will consider as they are presented by the record.

1. From this it appears, that the administrator presented three receipts as vouchers of expenditure by him for and on account of the estate of his testator, which were objected to by the legatees. As the principle upon which these vouchers stand is the same, we will consider them together. They all relate to a box tomb of marble, lettered and inscribed, which the administrator caused to be erected over the grave of the deceased. The whole expenditure for this purpose amounted to $210 88. This expenditure may well be classed under the head of funeral expenses, and its allowance or disallowance must depend greatly upon the value of the estate, and the desire of the deceased in reference to his interment, if such desire was made known by him before his death; and it would make no difference whether this desire was included in his will, or orally imparted to those around him.

The principal inquiry should be, is the expenditure for this purpose disproportioned to the means of the estate, or injurious to the interests of the creditors and family of the deceased? Whenever it is ascertained that the estate could well afford the expense, without materially affecting its funds, or injuriously affecting the interests of creditors, or of those who are to take and enjoy it after the death of the testator or intestate, there is no impropriety in allowing the administrator a credit for such expenditure.

In this case it is shown, that the estate in the hands of the administrator amounted to nearly eight thousand dollars; that there were but few, and these very inconsiderable, debts existing against the deceased, and neither widow nor children to be provided for. The estate is bequeathed to collateral relations; and the deceased expressed a desire that his remains should be deposited in a marble vault. Under these circumstances, the administrator might well esteem it his duty to make the expenditure which he has made, and there was no error in allowing him a credit for the sum so expended.

2. The two next exceptions refer to the allowance by the court of the sum of $114 67, the amount paid by the administrator to two solicitors, and the register in chancery for fees, in a certain suit in the Chancery Court commenced by the administrator against the legatees of the estate, in which the bill was dismissed by the Chancellor on general demurrer.

The facts disclosed by the record in relation to these items are as follows: The legatees of the estate applied for, and obtained from the Court of Probate, an order for citation to the administrator to show cause why he should not make a partial settlement of his administration. This citation was served on him, but he failed to appear. A second citation was issued, served, and disregarded by the administrator. On the return of the second citation, and failure of the administrator to appear and obey its mandate, the counsel of the legatees applied for and obtained a rule against him to show cause why he should not be attached for contempt. This rule was served upon him, and before final action was had upon it, he filed his bill in chancery, and obtained an injunction restraining all further proceedings in the Orphans' Court, in reference to the settlement of the estate, until the matters of the bill were heard and determined by the Chancellor. This injunction was granted by a circuit court judge.

The gravamen of the bill was, that the administrator was not prepared to make settlement with the Court of Probate, because he had not yet ascertained who were the parties in interest under the will of Jesse Bendall, deceased, or their places of residence, so as to enable him to bring them before the Probate Court in the manner required by the statute; but he admits that he had not used all the diligence which he could have used to accomplish this object. When this bill was filed, he had been in the office of administrator for the term of four years.

It is perfectly apparent from this, that the interest of the estate did not demand the filing of this bill, nor could it advance that of the legatees. We think it clear, that an administrator, in all litigation concerning the estate in his hands the tendency of which is to advance its interest, or to protect it from injury, is entitled to counsel at the expense of such estate. But we are unable to find any warrant in law to grant him this, when he engages in useless, unnecessary, or vexatious litigation

concerning the estate in his hands, and more especially when such litigation is with those who are lawfully entitled to the funds he withholds.—9 Ala. R. 900; 8 *ib.* 286; 7 Barr's (Penn.) R. 455.

For these reasons, our opinion is, the Probate Court erred in allowing the administrator a credit for any sum on account either of solicitor's fees or cost in the suit in chancery.

3. The next item in the administrator's account, to the allowance of which exception was taken in the court below, is the sum of $172 81, commissions paid to B. T. Moore, an attorney at law, for collecting $6884 42 of debts due to the estate from various individuals. The bill of exceptions sets out some proof in relation to this item, but does not state that what is thus set out is all that was offerred in reference to it in the court below. We have repeatedly held, that, when the bill of exceptions does not clearly show error, all fair deductions and inferences will be indulged by this court, in favor of the correctness of the judgment of the inferior court.

Bearing in mind this wise and well settled rule, we will proceed to examine the proof set out in the bill of exceptions, so far as it relates to this assignment of error. The only witness examined in reference to it is B. T. Moore, the attorney to whom the money was paid. He deposes, that he was the law-partner of the administrator; that the notes, amounting to $6884 42, when past due and unpaid, were handed over to him for collection; that suits were regularly instituted on two of them, and the money collected in due course of law; that against three others of the debtors writs were filled up, but the cases were never docketed in court, nor the writs in the hands of the sheriff; that the money in these instances, and in all those in which no process was issued, was paid to him by the debtors, and by him paid over to the administrator, less 5 per cent., the usual collecting fee. The bill of exceptions does not negative the idea, that the fact of placing the notes in the hands of the attorney, while it rendered him responsible for all loss which might result from his negligence or want of skill, also tended to hasten the payment on the part of the debtors; for it is notorious, that notes in the hands of an attorney, who threatens to sue upon them, are generally more promptly and readily paid than when they remain in the hands of the creditor. It

may also be true, that the attorney put himself to both trouble and expense, to see the debtors and make the collections. There is nothing in the bill of exceptions to negative this; and without all the proof upon the subject, we are unwilling to disturb the judgment of the court below.

The mere fact that the administrator and B. T. Moore were law partners at the time, which is so prominently set out in the bill of exceptions, and in the argument of the attorney for the plaintiff in error, is wholly without weight in considering the propriety of this allowance. We have already decided, upon full consideration, that allowances of this character may well be made to the administrator himself, if he be an attorney, and as such renders necessary legal services to the estate; the judge of the Probate Court deciding upon the propriety and reasonableness of the charges.—Harriss v. Martin, 9 Ala. R. 895. It would seem to follow from this, that there would be no impropriety whatever in the employment of the law partner of the administrator to render legal services for the estate, and in paying him a just and reasonable compensation for such services when rendered.

For these reasons, we are persuaded, that there is no error in the ruling of the court below in respect to this item of the account prejudicial to the rights of the plaintiffs in error, or of which they can justly complain.

4. On the final settlement of the court below, the administrator procured the services of two attorneys to attend to it on his part, to whom, according to his own statement of the account, be paid $150 each. To this item objection was made by the legatees, and the court reduced it one half.

We cannot say that this was error. Many items of the account, as it was rendered by the administrator, had been assailed by the legatees, and on some of them, as we have seen, the exceptions were not well taken. Under these circumstances, we think, the administrator was entitled to counsel for his own protection in the rightful discharge of the duties of his trust; and in such cases, it is not improper to charge the trust fund with the payment of fair and reasonable fees.

We cannot undertake to lay down a particular rule on this subject, which should govern the action of primary courts in every case. Much must necessarily be left to the sound dis-

cretion of those courts, both in relation to the *necessity* for counsel, and *the fees* which should be allowed to them; and on both these points those courts must look to the circumstances of each case, and decide accordingly. For, while the law delights to protect an honest and faithful trustee, and will shield him from the attempts of beneficiaries to charge him wrongfully, it will not, on the other hand, allow a faithless one to use the money of the trust to aid him in carrying on an unnecessary and vexatious litigation with the *cestui que trust*, arising out of his own bad faith in the use and management of the trust fund.—7 Barr 455; 1 Strob. Eq. R. 393.

The primary court should also be careful, to see that no greater number of attorneys should be employed than the necessity of the defence of the administrator or other trustee may demand. If several are employed, and separate fees charged and paid, when the court is satisfied that a less number would have been sufficient, the charge for all who are supernumerary should be disallowed; and an amount which would be a fair compensation for his necessary defence should be allowed to the trustee out of the trust fund.

5. The next exception is to the commissions allowed to the administrator for the management of the estate. The sum so allowed is five per cent. on the amount of cash which came to his hands.

The rule laid down in the case of Powell v. Powell, 10 Ala. R. 900, in relation to the allowance of commissions to a reasonable extent to executors and administrators, we believe to be the true one, and such allowance should never be refused, "except in cases of wilful default, or gross negligence, of which loss to the estate has been the consequence." Nothing of that kind has been made to appear by this record, or is even insisted upon in argument. The continuances of the settlement, we must suppose, were granted for sufficient reasons; and the record is silent, in most instances, as to the party applying for them. To grant or refuse them was within the discretion of the court below, and cannot be reviewed by us; nor can we look to them on the question of wilful default or gross negligence resulting in loss to the estate, for which alone the administrator would forfeit his right to compensation. The sum allowed is that usually given in such cases, and there was no error in making the allowance to him.

6. The next exception relates to the refusal of the court to charge the administrator with interest on the funds in his hands.

The record shows, that the administrator, on the day of the final settlement, filed the affidavit required by the statute, (Clay's Dig. 198 § 28,) the effect of which is to discharge him from the payment of such interest. The plaintiffs in error do not contest the sufficiency of the affidavit made by the administrator; but it is urged that the court erred in permitting it to be made at the time of the final settlement, as it did not allow them time to inquire into its truth, that they might decide whether they would controvert it.

By the second section of the act of 1843 (Clay's Dig. 229 § 42), the judges of the Probate Court are required to examine the accounts and vouchers of administrators on the day appointed for settlement, and state the same, when all exceptions may be taken and heard.—Steele v. Knox, 10 Ala. R. 608. It appears to us, that this would also be the proper time for the administrator to discharge himself from accounting for interest, if he has not used the funds of the estate. The language of the statute above referred to (Clay's Dig. 198 § 28), that "in making their return to the court, they shall expressly deny on oath," &c., is merely directory, and would not prevent the making of the oath, when the account is made up and stated by the court. If the legatees were taken by surprise by the making of the affidavit, and desired time to examine into the facts, with the view of raising an issue upon it, the court should continue the cause for that purpose. No suggestion of the kind seems to have been made in this case, and no denial was offered at the time the oath was made. Under these circumstances, it was not error for the court to act upon it, and the result of that action is in strict conformity to the requisitions of the statute.

7. The legatees objected to the manner in which the debit side of the account was stated, because no interest seemed to be charged on some items, and on others the principal and interest are so blended together that it is impracticable to separate them, or distinguish between them; and the account, as stated by the court, is exhibited to establish the facts relied on.

We have already said, that, under the act of 1843, it is the duty of the Probate Court to state the account between the administrator and the estate of which he has charge, at the

time of the final settlement. The account thus stated is the act of the court, and is the result of evidence furnished by the administrator and the parties in interest who contest the accuracy of the return of the administrator, or the legal sufficiency of the vouchers and proof presented by him. To enable this court to review the account thus stated by the court, and to decide upon the correctness of its items, it is indispensable that the bill of exceptions should set out the proof which was before the court below with respect to each item, and which controlled its action in respect to them. This is not done in the present record, and in its absence we must presume in favor of the correctness of the judgment below, and in this respect affirm it here.

8. The next and last assignment of error arises out of the final decree of the court below. It appears, that Isaac Bendall, Sally Anderson, and Barbary Jones, three of the legatees under the will of Jesse Bendall, died before the testator. The court below decided, that the legacies to them had lapsed, and proceeded to distribute them among the heirs at law of the testator, as in case of intestacy.

The language of the will making the bequest to Mrs. Anderson is: "I give to my sister, Sally Anderson, one sixth part of the net proceeds, that is not given away in this will to others, after my sale, to be paid her by my executors hereinafter mentioned, to her and her heirs forever."

The words "of my estate," after the words "net proceeds," will be supplied by the court, as, from the other clauses of the will, they were evidently intended to be used by the testator. The legacy of one-sixth part of his estate is given to five other legatees, including Isaac Bendall and Barbary Jones, in the same language used in the bequest to Mrs. Anderson, except that the words "of my estate" are used in these clauses of the will, and omitted in that which gives the legacy to her.

It is, therefore, too clear to admit of any other construction, that the testator intended the legatees named in his will should take their several bequests in their own absolute right, so that their children have no claim whatever under the will. It is clear, also, that the specific legacies to the three legatees, who died before the testator, became lapsed legacies; and the general rule in such cases is, that if the will contain a general resid-

uary clause, which is the case here, the specific legacies which have lapsed fall into the residuum, and pass to the residuary legatees.

But in the present case, we are met by this difficulty: the same persons who are the specific legatees, are also the residuary ones, and are each entitled to one sixth of such residuum.

The rule is well settled, that where one of several residuary legatees, who are to take in common, dies before the testator, his portion does not survive to his co-legatees, but goes to the next of kin according to the statute of distribution.—1 Roper on Legacies, 340; Peat v. Chapman, 1 Vesey, Sr., 541; Bagwell v. Dry, 1 Pr. Wms. 700; Owen v. Owen, 1 Atk. 494.

The case of Page v. Page, 2 Pr. Wms. 488, is nearly identical with the present. There the bequest of the residue of the personal estate was to six persons, to each of them a sixth part; one of them died before the testator. The Lord Chancellor said, "This is a lapsed legacy as to one sixth, and undisposed of by the will, the residuary legatees being tenants in common, and not joint tenants; and, therefore, the legacy shall not survive, but go to the testator's next of kin, according to the statute of distribution."

This case has been constantly followed in the English courts, except in the case of Hunt v. Barkly, in which Sir Joseph Jekyll, Master of the Rolls, held differently. But this latter case is cited and repudiated by the Lord Chancellor in Owen v. Owen, *supra*.

We think, therefore, the court below did not err in disposing of the legacies of Isaac Bendall, Sally Anderson, and Barbary Jones, as lapsed legacies to which the next of kin were entitled under the statute of distribution.

For the errors heretofore pointed out, the decree must be reversed, and the cause remanded.

MOORE *vs.* LEVERT.

1. By the common law, a tenant of a close is not bound to fence against an adjoining close, unless by force of prescription; and where no prescription or agreement exists, the legal obligation of the tenants of adjoining lands to make and maintain partition fences, depends entirely upon statutory provisions.
2. Our statute on the subject of partition fences, (Clay's Digest 241 § 4,) does not restrict a tenant's right to let his own lands lie open; he being responsible in damages for his cattle breaking into any grounds which are enclosed with a lawful fence.
3. The fact that some pannels of the defendant's outside fence were down, though not conclusive evidence that his lot was unenclosed, is nevertheless evidence whose weight should be left to the consideration of the jury in ascertaining that fact.
4. If defendant's lot is in possession of a trespasser, or of one claiming title in himself or a third person, defendant is not liable for the erection or repairs of a partition fence; but if he consent, as owner, to the erection of the fence, and it is made by the adjoining proprietor upon the consent thus given, he is estopped from denying his liability.
5. In an action to recover one-half of the expense of a partition fence, the actual interest which the parties have in the fence is a question which cannot arise.

ERROR to the Circuit Court of Madison.

Tried before the Hon. THOMAS A. WALKER.

THIS action (Francis J. Levert v. Benjamin T. Moore) was commenced before a justice of the peace, to recover one half of the cost of a partition fence. Judgment was rendered by the justice in favor of the plaintiff, and the defendant took the case, by appeal, to the Circuit Court. The plaintiff there filed a declaration containing the common counts in *assumpsit*, to which the defendant pleaded the general issue; and judgment was again rendered for the plaintiff, on the verdict of the jury.

On the trial, as the bill of exceptions shows, evidence was introduced tending to show, that defendant was the owner of the lot adjoining plaintiff's lot, and that the partition fence was erected on the line of said lots; that a dwelling house, a kitchen and a smoke house, were on defendant's lot. Evidence was also offered showing that one Thomas Bibb claimed possession of this lot, and was in possession of it, at the time said fence was

erected; but the character of his possession or claim is not explained by the record. It was proved, that some pannels of the outside fence around this lot were down at the time of the erection of said partition fence, so that stock could enter; and that, after the erection of said partition fence, most, if not all, of said outside fence fell down, or was taken down, and so continued until the commencement of the suit; but there was no evidence that defendant disclaimed title to said lot, when served with written notices, or when addressed orally by plantiiff, on the subject of erecting said partition fence. Said Bibb testified, that he was present when plaintiff and defendant had a conversation about said fence, and at the same time defendant took witness and another person to examine and see if said partition fence could not be repaired.

"The defendant's counsel asked the court to charge the jury, that, if they believed from the testimony that the defendant's lot, adjoining the plaintiff's lot, was not enclosed, but open and exposed, at the time of plaintiff's notice to build said fence, and at the time of building the same, then they are bound to find for the defendant. The court gave this charge, but added, the fact that the fence was down in two or three places, over which stock might pass, was not sufficient, alone, to warrant the conclusion that the lot was not occupied, unenclosed, open and exposed; they must look to all the proof, for the purpose of ascertaining whether the lot was not occupied, unenclosed, open and exposed.

"The defendant's counsel also asked the court to charge, that, if the jury believed from the testimony that said lot was in the possession of said Bibb, at the time of the notice given by plaintiff, and at the time of the building of said fence, then they must find for the defendant. The court gave this charge as asked, but added, if Bibb's possession was a mere naked possession, without any authority or control over the lot, his naked possession would not affect the plaintiff's right.

"Defendant's counsel also asked the court to instruct the jury, that, if they believed that defendant did have possession of said lot, at the time of said notice and the building of said fence, then plaintiff and defendant would be joint tenants, and plaintiff could not maintain this action. This charge the court refused, and the defendant excepted to the refusal,

as also to the explanations or qualifications of the other charges."

These several rulings of the court are now assigned for error.

SAMUEL D. J. MOORE, for plaintiff in error.

C. C. CLAY, JR., *contra:*

1. The defendant below was not entitled to the charge first asked by him and given by the court. It was abstract; for the only testimony offered by him, as to this point, was that, "at the time of the erection of said new partition fence, some pannels of the outside fence around said lot claimed by him were down so that stock might enter." The qualification of the charge was proper, lest the jury might infer from the charge given, that some pannels being down relieved defendant from his obligation to contribute, which was not intended by the Legislature.—Clay's Dig. 241 § 4. A careless, dishonest and litigious neighbor might, at will, avoid his obligation to repair a partition fence, by throwing down, or suffering to fall down, two or three pannels of his own outside fence. The true question was, whether Moore had abandoned his lot to the public.—Clealand v. Walker, 11 Ala. 1066.

2. The defendant below was not entitled to the second charge asked by him and given by the court. The proof shows, that he held himself out to plaintiff as owner of the lot, and as the one to whom he should look for contribution in repairing the division fence, and that plaintiff acted upon his admissions.—Hence, he is estopped from denying that he is responsible for repairs.—1 Greenl. Ev. 249 § 207; 19 Ala. 435. Again; Bibb's mere possession of the lot, at the time indicated, did not make him liable for the repairs, which were of a substantial, lasting character. At common law, a tenant from year to year was not bound to make such repairs.—Chit. Cont. 17, n. *b*, and 100, n. *c*, *d*; 6 Taunt. 301; 1 Marsh. 567. Much less was a tenant at will or sufferance. The statute does not alter the common law in this respect, (see Clay's Dig. 241 § 4,) as supposed from the use of the words "owners or possessors." But, if the charge asked and given was correct, the instructions added were necessary; for, surely, "a mere naked possession, without authority or control over the lot," did not make him

liable for such repairs, which the jury might have erroneously inferred, without the instructions added.

3. The last charge asked was properly refused. Possession of the lot by defendant did not make him and plaintiff joint tenants as to the division fence. Unity of possession alone made them, perhaps, tenants in common. Unity of title, time and interest, as well as possession, are necessary in joint tenancy. The plaintiff could maintain this action. The statute (Clay's Dig. 241 § 4) says: "the charge of such division fence, so far as enclosed on both sides, shall be equally borne and maintained by both parties." The same statute gives a summary remedy, but does not, expressly or impliedly, negative plaintiff's right to his common law remedy.—Chit. Plead. 163–4. This court recognizes plaintiff's right to his common law remedy in construing this statute in 8 Ala. 495. Anciently, one joint tenant, or tenant in common, had his writ *de reparatione facienda*, against another who would not repair.—Fitz. N. B. 295, 378; 1 Coke, book 2, chap. 26, p. 200 b. Assumpsit has superseded the ancient remedy.—6 Cowen 475; 12 Mass. 70; 9 *ib.* 540; see, also, 3 Kent's Com. 437–8; 4 *ib.* 370–1.

GOLDTHWAITE, J.—The common law doctrine in relation to partition fences, is, that a tenant of a close is not bound to fence against an adjoining close, unless by force of prescription (Churchhill v. Evans, 1 Taunt. 529; 4 Met. 589); and where no prescription or agreement exists, the legal obligation of the tenants of adjoining lands to make and maintain partition fences depends entirely upon statutory provisions. Our statute (Clay's Digest 241 § 4) provides, "that where any neighbors shall improve lands adjacent to each other, or where any person shall enclose any land adjoining another's land already fenced in, so that any part of the first person's fence becomes the partition fence between them, the charge of such division fence, so far as enclosed on both sides, shall be equally borne and maintained by both parties." It was not, however, the intention of the Legislature, to restrict the right of the tenant to let his own land lie open; he being responsible in damages for his cattle breaking into any grounds enclosed with a lawful fence.—Clay's Dig. 241 § 1.

One of the requisites necessary, in order for the plaintiff be-

low to maintain his action, was, that the land of the defendant should have been enclosed; and although the fact that some pannels of the outside fence were down, so that stock could enter, might not have been conclusive upon that question, it was nevertheless evidence to be taken into consideration by the jury in ascertaining that fact. The qualification to the first charge was, in this aspect, erroneous, as it asserted the proposition that the fence being down in two or three places was, in itself, no evidence that the lot was not enclosed. This was invading the province of the jury, whose duty it was to determine upon the weight to be attached to evidence of this character.

The qualification to the second charge, also, in our opinion, laid down the law too broadly. Bibb's possession must either have been under a claim of right in himself or a third person, under the defendant, or as a trespasser. Now, if the charge regarded him as a trespasser, which we suppose from the language employed it did, it is very clear that the actual owner could not be made liable for the erection or repairs of the fence; for the reason, that, had he been in possession, he might have left the lot open and exposed. The same reasons would apply, if Bibb was holding under a claim of right in himself or a third person. The record does not show that he held under the defendant, Moore, and we do not, therefore, consider the case in that aspect. If, however, as owner, he consented to the erection or repairs of the fence, and the other party made them upon the consent thus given, it would be a clear case of estoppel *in pais*, and of course he would be liable.

In the refusal to give the last charge there was no error. To entitle the plaintiff to recover, as we have already said, the requisitions of the statute must be pursued, and the actual interest which the parties have in the partition fence, is a question which cannot arise in an action of this nature.

The judgment is reversed, and the cause remanded.

ISBELL *vs.* MACLIN ET AL.

1. A will contained this clause: "I give and beqeath to my half-sister Adeline (then unmarried) all my property, of whatever kind or description, provided she shall survive me, under the following conditions: should she marry, and have lawful issue, then said property is to go to her and her heirs; but, in case my said half-sister should die without any lawful issue, then, and in that case, it is my will, that all my property should go from my said half-sister to —— H., son of J. H., now living in Greenville Co., Va., to whom I give and bequeath all my property, in case of the death of my said half-sister without lawful issue, as above mentioned": *Held*, that the limitation to —H. was not too remote, but that he took a vested interest in the property, on the death of the testator, subject to be defeated by the performance of the conditions annexed to the bequest to said Adeline; that said Adeline's estate became absolute on her marriage and birth of lawful issue, and that her husband, on the birth of such issue, might alienate the entire property.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

DETINUE by the defendants in error, infants who sue by their next friend, for the recovery of certain slaves. After the action was commenced, and before the return of the writ, one of the plaintiffs died; whereupon his death was suggested on the record, and plaintiffs proceeded in the name of the survivors, but defendant reserved the question of their ability thus to continue the suit.

The plaintiffs sue as the children and lawful issue of William J. Maclin and Adeline T., his wife, formerly Adeline T. Heath, and claim title under the will of Alexander W. Heath, which contained the following clause: "I give and bequeath unto my half-sister, Adeline T. Heath, all my property, of whatever kind or description, after all my just and lawful debts are paid, provided she shall survive me; upon the following conditions: should she marry, and have lawful issue, the said property is to go to her and her heirs; but, in case my said half-sister should die without any lawful issue, then, and in that case, it is my will, that all my property should go from my said half-sister to —— Harris, son of Joseph Harris, now living in Greenville County, Virginia, to whom I give and bequeath all my prop-

erty, in case of the death of my said half-sister, Adeline T. Heath, without lawful issue, as above mentioned."

This will was probated in 1838, in Madison County, Alabama. Said Adeline died in 1849, before the commencement of this suit. After the marriage of said Adeline T. with said William J. Maclin, and after issue born of said marriage, the said William J. conveyed said negroes, which he had acquired by virtue of his marriage under said will, to one Rutledge as trustee, for the security of certain debts of the grantor. The negroes were sold under the deed by the trustee, and the defendant became the purchaser.

The court charged the jury, in effect, that the plaintiffs were entitled to recover on this proof; and verdict and judgment were rendered for them accordingly. The defendant excepted to the charge of the court, and he now assigns it for error, together with other rulings which it is unnecessary to notice.

The case was argued orally at the bar, by Messrs. White & Parsons for the plaintiff in error, and Messrs. Rice & Morgan for the defendants; and after the delivery of the first opinion, a re-argument having been ordered, written arguments were submitted, from which the annexed briefs are condensed, presenting only a summary of the points made and authorities cited.

White & Parsons, for plaintiff in errror, contended:

1. That the literal construction of the will showed an intention to give Adeline T. Heath an estate in fee, rather than an estate for life with remainder to her children.

2. Upon the legal effect of the will, that the terms "her and her heirs" have a known, fixed, legal signification, which, in most cases, has been adhered to, even though it overturn the manifest intention of the testator, and has been rejected in no case, except upon the most manifest intention to the contrary. Shelley's Case, 1 Coke's R. 93; Price v. Price, 5 Ala. 578; Morgan v. Jones, 1 Bro. Ch. 206; Hamner v. Smith, 22 Ala. 440.

3. That, even though the estate might be regarded as a remainder in the children of Adeline T. Heath, yet it is also an estate by descent; and that being able to take either by pur-

chase or by descent, the rule is inflexible that they must take by descent.—Morgan v. Jones, *supra*; Hamner v. Smith, *supra*; Ewing v. Standifer, 18 Ala. 400; 4 Kent's Com., m. p. 217.

4. That the children of Adeline T. Heath, if they took at all other than as heirs, took a vested remainder, which, immediately upon her having issue, was executed by the ancestor in possession, and changed her estate for life into an estate tail at common law, and thus, under our law, vested the entire estate in the first taker.—4 Kent's Com., pp. 202, 203, 206, 207, 210; 2 Black. Com., m. p. 151; Darden v. Burns, 6 Ala. 365.

5. That Adeline T. Heath's estate is absolute, subjected to certain conditions; that the conditions having been performed, the restriction is gone, and the estate resumes its original absolute nature; that the instrument, being a will, must necessarily take effect *in futuro*, and thus the condition might be either precedent, subsequent, or simultaneous with the attaching of the estate; that, as a matter of proof, it was precedent thereto, and the legal consequences attendant upon the case as it is necessarily flow from it.—Lord Stafford's Case, 8 Coke's R. 74; 2 Black. Com., m. p. 151.

6. That in giving to the term "heirs" any other than its known legal signification, the court would depart from a salutary and established rule of great importance, sanctioned and reaffirmed by numerous decisions of our own and other courts.—Shelley's Case, 1 Coke's R. 88; Morgan v. Jones, 1 Bro. Ch.; Price v. Price, 5 Ala. 578; Ewing v. Standifer, 18 *ib.* 400; Hamner v. Smith, 22 *ib.* 438.

Rice & Morgan, *contra*:

The words "heirs" and "lawful issue" are not used by the testator in their technical sense, but in their common acceptation; he evidently uses them as synonymes, and as descriptive of the objects of his bounty, viz., the children of Adeline T. Heath born in lawful wedlock.—Moore v. Moore, 12 B. Mon. 655; King v. Beck, 15 Ohio 559; Shepherd v. Nabors, 6 Ala. 636; Williams v. Graves, 17 *ib.* 62; Powell v. Glenn, 21 *ib.*; Cox v. Beltzhoover, 11 Missouri R. 142; Evans v. Wells, 7 Humph. 559; Rives v. Frizzle, 8 Iredell's Eq. R. 237.

The bequest is to a class of persons, without any specific

designation by name, subject to increase or diminution in number by future births or deaths. The time of distribution is fixed on the happening of a future event, to-wit: the death of Adeline T. Heath. The entire interest vests in such persons only as at that time fall within the description of persons constituting such class. Under this bequest, the first born lawful child of Adeline T. Heath, at its birth, took a vested estate in remainder, which opened to let in other children to the estate, on their respective births; and such vested remainder became a fee-simple absolute in the children living at the death of their mother.—Williams v. Berry, 8 How. (U. S.) R. 495; Saterfield v. Mays, 11 Humph. 58; Shepherd v. Nabors, 6 Ala. 636; 1 Jarman on Wills, pp. 295, 296; 1 Roper on Legacies, p. 71, and cases there cited.

Adeline T. Heath took a life estate under the bequest, if she survived the testator; no other interest or estate in her favor was to arise on any other condition. The terms "upon the following conditions," are not used in any technical sense, but merely to show that, in no event, was said Adeline to have a fee simple, absolute estate, and to point out what direction the property should take on her death; in other words, to indicate who were the cherished objects of the testator's bounty next after her; she was the first object of his bounty, her lawful children were the second, and Harris was the third. The ulterior limitation to Harris embraces "all the property" of the testator; and this fact conclusively shows, that, if said Adeline married and had children, which were extinct at her death, the property should go "*from*" her "*to*" Harris, and utterly excludes the idea that he intended her to have the absolute estate if she married and had lawful issue. The omission of the words "for life," in the bequest to her, is not important when the intention otherwise appears.—McCroan v. Pope, 17 Ala. 612; Howe v. Fuller, 19 Ohio 51; Reed v. Snell, 2 Atk. 642; Lampley v. Blower, 3 *ib.* 397; 2 McCord's R. 92 to 101.

Although a woman marries, and has lawful issue, yet, if all such issue has become extinct before and at her death, she dies "without any lawful issue," as much so as if she had never had any lawful issue. The expression "dying without issue," when used in a will, has two senses, and two only: 1st, a vulgar sense, viz., dying without leaving issue surviving at the

time ; and 2nd, a legal sense, viz., an indefinite failure of issue. —Target v. Gaunt, 1 Pr. Wms. 432 ; Hughes v. Sayre, *ib.* 534 ; Pleydell v. Pleydell, *ib.* 748 ; Atkinson v. Hutchinson, 3 *ib.* 258 ; Anderson v. Jackson, 16 Johns. 382, 436 ; Jackson v. Blanshaw, 3 *ib.* 292 ; Jackson v. Chew, 12 Wheat. 153 ; Doe, *ex dem.* Cadogan, v. Ewart, 34 E. C. L. R. 194 ; Higgenbotham v. Rucker, 2 Call's R. 313. It is admitted in this case, that the expression was not used in its legal sense, for then the remainder to Harris would be too remote ; and, of course, it must have been used in its common acceptation. The right of Harris is not restricted to the case of her dying without ever having had any lawful issue, but is more enlarged : the property was to go to him, in case of her death without any lawful issue surviving her.

Four incidents belong to every increase of an estate by force of a condition precedent, to-wit : 1st, a particular estate, as a foundation upon which the increase of the greater estate shall be built ; 2nd, that such particular estate ought to continue in the grantee until the increase happens ; 3rd, it ought to vest at the time the contingency happens, or otherwise it shall never vest ; and, 4th, the particular estate and the increase ought to take effect by one and the same instrument.—Lord Stafford's Case, 4 Coke's R. (Part VIII), p. 75. In this case, the second and third incidents were wanting.

It is unreasonable to suppose that the testator intended that the very issue whose existence at their mother's death would exclude Harris, should themselves take nothing under the will. It would be unnatural for the testator to provide for Harris, a stranger, at the death of Adeline T., and yet leave her lawful issue, if living at her death, unprovided for ; and an unnatural construction is never favored.—2 Burr. 771 ; 3 Atk. 525 ; 3 Murph. 31.

It is a certain rule, in the exposition of wills especially, that effect shall be given to every word—that "every string should give its sound."—Baker v. Giles, 2 Pr. Wms. 280 ; Edens v. Williams, 3 Murph. 27 ; 3 Atk. 524 ; 2 Burr. 770 ; 12 Mass. 447. The necessary effect of the construction which would give Adeline T. Heath a life estate, to be enlarged into an absolute fee-simple estate upon her marriage and birth of lawful issue, is, to entirely expunge from the will the important words

"*and her heirs.*" If those words are to have no meaning, why were they inserted? The expression "is to go," strikingly denotes a succession of possessors—the transition of said property to the first person named, and next to those who are next described.

The construction for which we contend, gives effect to every word in the will, harmonizes every provision, and accords with the dictates of reason, justice and nature, and with rules of law sanctioned by the wisdom of ages.

GIBBONS, J.—It is contended by the plaintiff in error that the limitation over to —— Harris is too remote, and therefore void; and this limitation being void, that the first taker, Adeline T. Heath, (afterwards Maclin,) took an absolute estate under the will.

The words of the limitation are: "but in case my said half-sister should die without any lawful issue, then, and in that case, it is my will, that all my property should go from said half sister to —— Harris," &c. The words "*without lawful issue*," uncontrolled or unexplained by any other words or expressions in the will, limiting the failure of issue to any specific time, would undoubtedly be a limitation too remote, and void as an executory devise. This was the doctrine held in this court, in the case of McGraw v. Davenport, 6 Porter 317. In that case, certain slaves were devised to two of the daughters of the testator, named Louisa and Cynthia, and then followed this clause: "*Or should either of them die without issue, the other is to get the whole of the seven negroes and their increase.*" *Held*, that each of the daughters took an absolute estate. Also, in Darden v. Burns, 6 Ala. 362, the testator, after devising certain property to his daughters, adds the following clause: "My meaning is, the heirs of my daughters above named are to inherit the above bequests; and if no lawful heirs of their bodies, then to revert to the family estate:" *Held*, that the daughters took an absolute estate. Again; in the case of Machen v. Machen, 15 Ala. 373, the words of the bequest were: "I leave to Jane Machen two negroes, Tamar and Price, during her natural life, then to her bodily heirs. If there should be no heirs, for said negroes and increase to go back to the heirs:" *Held*, that Jane Machen here took the entire estate.

In Allen v. White, 16 Ala. 185, a bequest to one son, in trust for another son, "*his family and lawful children, which he now has or may hereafter have, and the survivor of them*, was held a limitation too remote, and the first taker took an absolute estate. Also, in Standifer v. Ewing, 18 Ala. 400, the words of the bequest were: "I lend to my daughter Lydia Standifer, during her natural life, five negroes," &c. "These five negroes, with all their increase, I *will to the lawful begotten heirs of Lydia Standifer, to be equally divided among them at her death: Held*, that these words created an absolute estate in the first taker. In this last case, however, it is proper to remark, that the decision is not placed upon the ground that the limitation was too remote, but that the word "heirs" in the bequest was to be taken as a word of limitation, and not of purchase; that the words of the bequest presented a case, where the persons designated could take both as heirs and purchasers; and applying to them the rule well established in such cases, they must take as heirs, and not as purchasers.—4 Kent's Com. 217, and cases cited. These cases, we think, sufficiently show, that the rule in Shelley's case, in all cases where it is applicable, is now established in this State as a law of property; too well established, indeed, to be questioned or overruled by subsequent judicial decision. In analogy to this rule, it is held, that where words are employed by a testator, which, if applied to realty, would create an estate tail, they create an absolute estate when applied to personal property.—4 Kent's Com. 227.

But, whilst we acknowledge the binding force of the rule in Shelley's case, and entirely concur in the views expressed by this court in the cases above cited, it is equally true, as a principle, that the intention of the testator must be regarded, and carried out, if consistent with the law; and the whole will must be examined, to see if it is an indefinite failure of issue which is meant, and which the law forbids, or whether it is a failure of issue at a particular point of time, which the law sanctions.—4 Kent's Com. 228. Courts often seize upon slight circumstances to take the case out of the rule, and sometimes, in their avidity to avoid what appears to be a severe restraint upon the alienation of property, according to the supposed wishes of the testator, do violence to sound rules of interpretation. Our view is, that these rules should be honestly applied to each case,

as it arises, and if, by a fair construction, it can be gathered that the testator meant to tie up the limitation to a particular point, not prohibited by law, that intention should be upheld by the courts; but if it is not so limited, it should be declared void. In Woodley v. Findlay, 9 Ala. 716, the words of the bequest were: "I lend unto my grand-daughter, Mary Foster, one negro girl, called Little Dinah, during her natural life; and at her death, I give and bequeath the said negro girl and her increase to the lawful issue of her body that may then be living, to them and each of them, share and share alike, their heirs and assigns forever; but, should the said Mary die without lawful issue, then to go to her sisters, share and share alike." Here the limitation to the sisters is expressed in language not unlike that employed in the case at bar. This limitation was held good, because, says the court, "it is evident, the testatrix contemplated the remainder to vest in them (the sisters) during their lives." In Dunn v. Davis, 1[illegible] Ala. 135, the words of the bequest were: "I give to my daughter Minna, during her natural life, and at her death to her heirs or children, my negro man Abram:" *Held*, that the daughter Minna took only a life estate, and that the words "heirs or children" were words of purchase, and not words of inheritance, (Goldthwaite, J., dissenting). Also, in Shepherd v. Nabors, 6 Ala. 636, a deed was made of a certain negro to the heirs of a certain daughter of the grantor, *born of her body*, the grantor reserving a life estate in himself: *Held* to be good as an executory devise, and that the heirs of the daughter, born of her and living at the death of the grantor, took under the deed. In Williams v. Graves, 17 Ala. 62, the words of the limitation were: "It is hereby declared to be my intention, that the negroes willed and devised to my said daughters is for the support and maintenance of the heirs of their bodies begotten or to be begotten; if either of my said daughters should die without an heir of her body begotten, the property of this one to pass off and become the property of the surviving daughter and my two sons and their heirs; each one to have an equal share of the property willed to the daughter so dying without heirs:" *Held*, that the term "*surviving*" limits the meaning of the words "*die without an heir of her body begotten*," to issue living at the death of the first taker. So, in Flinn v. Davis, 18 Ala. 132, per C. J. Dargan, the court,

however, expressing no opinion, where a testator bequeaths personal property to his daughter and the heirs of her body, and if she dies without *leaving lawful issue from her body* then over: *Held*, that the word "*leaving*" limited the meaning of the words "*issue from her body*," to issue living at her death, and the limitation was good as an executory devise.

We have cited the latter class of cases, to show that, in reference to wills, it is a rule of construction in this court, to examine the instrument, and if it can be fairly gathered from the expressions used by the testator, that he intended a definite limitation within what the law allows, the court will give it that interpretation, although the words employed by the testator, taken in their technical sense, and disconnected from other expressions, would import an indefinite limitation, and one forbidden by law.

Let us now test this will by this rule. The words are: "but *in case my said half-sister should die without any lawful issue, then, and in that case*, it is my will, that all my property should go *from* said half-sister, *to* —— Harris, son of Joseph Harris," &c., "to whom I give and bequeath all my property, in case of the death of my said half-sister, Adeline T. Heath, without lawful issue, as above mentioned." When is this limitation to take effect, and become an absolute property in —— Harris? The words of the testator answer the question: "*then, and in that case*, that is, on the death of the first taker without lawful issue. This construction receives further confirmation from the subsequent words of the will: "In default of *lawful issue* at the death of the first taker, the property was all to go *from* the said Adeline T. *to* the said —— Harris;" thereby excluding the idea of any intervening party taking the property after the death of Adeline T. before it passed to —— Harris. We think attention to this phraseology of the will brings the mind to the irresistible conclusion, that the testator meant a failure of issue at the death of Adeline T. Heath.

In arriving at this conclusion, we are not aware of doing violence to any sound rule of interpretation, but give to each phrase and expression of the will its full force and effect, as part and parcel of the same instrument. Our conclusion is, that the limitation to Harris is not too remote, but good; and that he took, on the death of the testator, a vested interest in the prop-

erty, subject, however, to be defeated, on the performance of the conditions annexed to the bequest to the first taker.

We have not thought proper to review, in this opinion, the English cases cited on the argument, nor those of our sister States. They are very numerous, often conflicting; and in some is to be found, we think, a departure from well established principles. This review has been made by this court in many of the cases above cited, and we are satisfied with their conclusions, as there expressed, so far as those decisions affect the present case.

The next question presented is, what estate did Adeline T. Heath (afterwards Maclin) take under this will? It is contended on the part of the defendants in error, that she took only a life estate, and that on her death her children, the plaintiffs in the court below, became invested with the title to the property, as purchasers from the testator. On the other hand, it is contended by the plaintiff in error, that she took a life estate only in the event that she died *without lawful issue*; but that when she married and *had lawful issue*, her estate became absolute.

In the construction of wills, it is admitted, that the intention of the testator, if it can be arrived at, and if it is legal, makes the law of the case. What estate, then, did the testator intend that Adeline T., the first object of his bounty, should take under this will? It is clear, that, if she outlived him, and died without lawful issue, she would take but a life estate; and at her death without such issue, it is expressly provided that the property should go from her to Harris. But how does it appear from the will that she was to take only a life estate in any event? The first bequest was to her, provided she outlived him; not for life only, but to her without any qualification whatever, except that she outlived him. But it is not yet determined what estate she shall take. That remains yet to be fixed by the testator; and then follows this clause. "*upon the following conditions: should she marry, and have lawful issue, the said property is to go to her and her heirs.*" This is the largest estate that any one can possibly have in property, an absolute fee simple title. It would seem that the testator had in his mind two prominent ideas in the disposition of his property, and but two: one was, to give his half-sister an absolute estate, on the happening of certain contingencies; and

the other was, in case those contingencies did not happen, then to limit her to a life estate, with remainder over to —— Harris. The first object is now accomplished, by his will, and then follows the clause affixing the contingency: "*but in case my said half-sister should die without any lawful issue*," &c., by which the property is limited over, and she confined to a life estate.

We cannot presume that the testator intended to provide for the issue or children of his half-sister as purchasers, for they were not then in being. Besides, that would be to cripple and diminish the estate, which the first object of his bounty was to take. Instead of taking from him an absolute property, that would be limiting her to a life estate, and in favor of persons not yet in existence. We think the plain intent of the will is otherwise. The word "heirs" is no where else used in this will, and seems to be employed by the testator here, for the express purpose of measuring the estate that the first object of his bounty was to take. The word seems to be employed, not as a word of purchase, but as one of inheritance; and we think that it was the intention of the testator to employ it in this sense. It does not seem to be used as synonymous with lawful issue, but in a more enlarged sense. So far from limiting her to a life estate in any or every event, we think it clear, that it was but in one event that he so limited her, and that was, that she died without lawful issue. We arrive at this conclusion very naturally, first, because this is the legal import of the words upon their face, when considered all together; and, secondly, from the circumstances under which the will seems to have been made. It is apparent from the will, that the first object of the testator's bounty was his half-sister, Adeline T., and rather than have his property go to collateral heirs, he preferred limiting it over to —— Harris. But if this first object of his bounty produced a line of lineal descendants, he was satisfied, and there was no longer any occasion for the limitation over.

Our conclusion is, from a careful examination of this will, that Adeline T. Heath took under it an estate for life, in any event, if she survived the testator; and if she married, and had lawful issue, then her estate became absolute; but, if she had died without lawful issue, then she would have had but a life estate, and the remainder-man would have taken.

It follows, as a necessary consequence, that the husband of Adeline T. Heath, by his marriage, acquired her rights, and, on issue being born, he became invested with the absolute title to the property, and could alienate it by deed. As the defendant traces his title by conveyances directly from William J. Maclin, the husband, his is therefore the better title, and the court below erred in its instruction to the jury. As this view of the case necessarily disposes of it finally. we have not thought it necessary to consider the other question presented by the bill of exceptions.

The judgment of the court below is reversed, and the cause remanded.

CHILTON, C. J., not sitting.

NOTE by Reporter.—A rehearing having been granted after the delivery of the foregoing opinion, the following opinion was afterwards pronounced:

GIBBONS, J.—A re-hearing was awarded in this case, for two reasons: first, because the circumstances of the case, with the amount of property involved, rendered it important; and. secondly, because the court felt a sincere doubt of the correctness of the conclusions to which it had arrived as announced in the opinion delivered in the case, and wished to test the correctness of those conclusions by further examination and reflection. This has been bestowed upon the case, and the court still feels bound to adhere to the conclusions announced in the opinion delivered. That opinion announced and decided two propositions: first, that the limitation to —— Harris was not void, as being too remote; and, secondly, that on the marriage and birth of issue by Mrs. Maclin, her estate became absolute. In the announcement of the conclusion upon the first of the above propositions, the court may have used language calculated to mislead, and, in fact, thereby have given rise to the error into which the counsel of the defendants in error have fallen, in supposing that the limitation was pronounced valid because it was confined to issue living at the time of the death of the first taker. This is not the meaning of the court. The death of the first taker is certainly the period beyond which the con-

tingency cannot happen on which the estate of Harris is made to depend; and being limited by her death, therefore, is not too remote. The estate of Harris, whether it be a vested or a contingent remainder,according to the strict definitions of those terms as laid down by Chancellor Kent, (*vide* 4 Kent's Commentaries, 203 to 207,) is undoubtedly an estate subject to a condition or contingency; and the very condition or contingency which renders the estate absolute in Mrs. Maclin, defeats the estate of Harris. The true construction of the will is, that Harris takes the estate, if the first taker dies without having had lawful issue; and, *vice versa*, on the first taker having lawful issue, her estate becomes absolute, and the estate of Harris is defeated by the happening of the contingency on which it is made to depend. It matters not whether the issue of Mrs. Maclin was living at her death or not, so far as respects the estate of Harris. On the issue being born, his estate is divested or defeated, and can never revest by a subsequent failure or death of the issue. With this explanation, there is no incongruity or incoherence in the opinion delivered by the court that we are able to perceive; and we are satisfied, that the conclusions announced on the construction of the whole will, are correct. But it is contended, that the phraseology of the will contains another limitation to the heirs or children of the first taker, and it is on that supposed right that the present action is based. To this construction of the will there are unsuperable obstacles, under the decisions of this court. It is the established doctrine of this court, that, when the language of a will is such that a named class of persons may take as heirs or purchasers, they must take as heirs, and not as purchasers.—Ewing v. Standifer, 18 Ala. 400. The same doctrine was reaffirmed in the case of Hamner, adm'r, v. Smith, 22 Ala. 433, after the most careful examination which the principle involved could receive at the hands of the court. Applying this principle to the language of the will under consideration, it is decisive of the question; for no one can contend, for a moment, as it seems to us, that under the language of the will, the plaintiffs, as the issue of Mrs. Maclin, cannot take as her heirs, and if they can so take, then they must so take, and that would make the estate of the first taker absolute.

Again; concede, for the sake of argument, that the proper

construction of the limitation to Harris is, that it is made to depend upon issue living at the death of the first taker; then the word "heirs" is employed to designate the objects in whom is to vest the second remainder on the birth of lawful issue from Adeline T. Heath. What authority have we under the will for confining the word "heirs" to children, or lawful issue of the first taker? The remainder must vest in any one that answers the description of heir. Children, or lawful issue, certainly would fill that description, and could claim that the remainder had vested in them. But so, also, could the remotest descendants of such children or lawful issue; and so, also, could the collaterals of the first taker. Suppose, then, the case to have happened, that there were no children, or lawful issue of the first taker, alive at her death, but there were found descendants of such children or lawful issue. Who would take the property, they or Harris? Again; suppose there were no children, or lawful issue, or descendants of such, on the death of the first taker, and Harris, coming to claim the estate, is met by a collateral, who claimed to fill the requirements of the will, as heir to the said Adeline. Who then would take? And who could say that such collateral did not fill the description of persons designated in the will, as being entitled to the remainder? We have indulged in these suggestions, merely to show the difficulties that will at once spring up when we depart from well established principles. We think it safer to adhere to them; and, as we understand them, as applicable to the will under consideration, they are opposed to the rights set up by the defendants in error.

The first opinion pronounced by this court, with this explanation, must be permitted to stand, and the judgment must be entered accordingly.

Chilton, C. J., not sitting.

TOWNSEND ET AL. *vs.* JEFFRIES' ADM'R.

1. A *certiorari* cannot be awarded to bring up an amended record, unless by consent, until the amendment has been made in the court below.
2. When defendant is in court, and consents to the revival of a suit in the name of an administrator as plaintiff, and at a subsequent term continues the cause, he will be held to have waived all objections to the order of revival.
3. When an executor brings trespass for injuries inflicted on a slave belonging to the estate of his testator, the suit may be revived, after his removal, in the name of the testator's administrator.
4. In a plea in abatement, form is substance; and therefore, in trespass, a plea in abatement defending "the *wrong* and injury," instead of "the force and injury," is bad on demurrer.
5. If a party fails to object to an interrogatory which asks for a conclusion of law, he cannot object to the answer, if it is responsive.
6. In trespass for whipping a slave, a plea averring that defendant only punished said slave reasonably and moderately, is defective on demurrer. No person has a right to chastise a slave belonging to another, without the owner's consent, unless the authority is given to him by statute; and if he acted under such authority, he must aver it in his plea.

ERROR to the Circuit Court of Madison.

Tried before the Hon. JOHN E. MOORE.

TRESPASS VI ET ARMIS by "Willis Routt and Elizabeth E., his wife, executor and executrix of the last will and testament of Alexander Jeffries, deceased," to recover damages for injuries inflicted by the defendants on a slave belonging to the estate of plaintiffs' testator; the writ and declaration both being in the name of Routt and wife, "executor and executrix of the last will and testament of Alexander Jeffries, deceased." The defendants pleaded, "first, not guilty; secondly, that they had only punished said negro reasonably and moderately, for his having killed, used and injured their hogs, or the hogs of some of said defendants; thirdly, that the punishment mentioned was authorized by the plaintiffs, or their agent in their behalf." A demurrer was interposed to the second plea, and issue was taken upon the first and third pleas. These proceedings, which were all "in short by consent," were had at the August term, 1848.

At the April term, 1849, the case seems to have been tried by a jury, and a verdict and judgment rendered for the plaintiffs; but the entry shows no action on the demurrer. This judgment was reversed on error by the Supreme Court, at its June term, 1849, and the cause was remanded.—See 17 Ala. R. 276. After its return to the court below, at the August term, 1850, the following entry was made: "Came the parties by their attorneys, and ask leave of the court here to revive in the name of James Thomas, sheriff, and *ex officio* administrator of Alexander Jeffries, deceased; which leave is granted, and said cause is continued by the plaintiff."

At the February term, 1851, the cause was continued on account of the sickness of the defendants' counsel. At the August term, 1851, it was continued at the instance of the defendants. At the February term, 1852, the defendants filed a plea in abatement, for a variance between the writ and declaration; and on a subsequent day of the term the following entry was made: "Came the defendants by their attorneys, and now here move the court to dismiss this suit, because said suit could not be revived in the name of said plaintiff as such administrator, and because this suit is discontinued, not having been continued on the minutes of the court in the name of said Willis and Elizabeth; which motion was overruled by the court. Thereupon the plaintiff asked leave of the court to amend his declaration, which was granted; and thereupon plaintiff amended his declaration, inserting by interlineation the word "as" before the words "executor and executrix," and the words "as executor and executrix as aforesaid" after the words "the property of the plaintiffs," and at the end of the declaration, after the word "plaintiff," the words "as executor and executrix as aforesaid:" and the declaration, so amended, offered to file in this cause; which defendants opposed, and moved to strike out; which motion the court overruled.—Thereupon, upon their motion, the court granted defendants leave to file their plea in abatement, which they now here file in court; and thereupon came plaintiff by attorney, and demurred to said plea in abatement; and after argument, the court sustained said demurrer, and adjudged said plea insufficient; and the cause is continued by defendants."

At the August term, 1852, the death of Parks Townsend, one of the defendants, was suggested, and the suit abated as to him. The court then sustained the demurrer to the second plea; and the cause being tried on the issues joined on the other pleas, a verdict and judgment were rendered for the plaintiff. On the trial, as appears from the bill of exceptions, the plaintiff read in evidence to the jury the deposition of Adam Dale, taken on interrogatories, a copy of which had been regularly served on the defendants. The fifth interrogatory to this witness is as follows: "Did you, or not, see said defendants, or either of them, commit any trespass, about the last named time, on any slave?" and calls upon him to state the particulars. The answer is as follows: "I did see the said defendants commit a trespass on said negro slave named Lewis, the property of said Alexander Jeffries, deceased, on or about May 15, 1848, on the premises of said estate:" and he then proceeds to detail the circumstances attending it. The defendants objected on the trial to the reading of the first part of this answer, above quoted: but their objection was overruled, and they excepted.

The errors assigned are: first, the overruling of the motion to dismiss the suit; second, the sustaining of the demurrer to defendants' plea in abatement; third, the sustaining of the demurrer to the second plea in bar; fourth, in not excluding from the jury that part of Dale's deposition which was objected to, as shown in the bill of exceptions; fifth, in the several rulings shown in the bill of exceptions.

Before the case was submitted on the merits, the plaintiffs in error asked for a *certiorari*: on which motion the following opinion was delivered:

CHILTON, C. J.—The plaintiffs in error, in this case, move for a *certiorari*. It is conceded, that the record is complete, as it stands: but they wish to amend it in the court below. The amendment must be made before a *certiorari* can be awarded, unless by consent: for, until then, there is nothing in the court below to be sent up in obedience to it.

Motion refused.

ROBINSON & JONES, for plaintiffs in error.

C. C. CLAY, JR., and J. W. CLAY, *contra :*

I. Neither of the grounds, on which defendants below moved to dismiss the suit, was tenable, and the motion was properly overruled: 1. In their notice to dismiss, the defendants did not deny, and so virtually admitted, that Thomas was Jeffries' administrator; and, if administrator, the suit was properly revived and continued in his name.—Clay's Dig. 227 § 30. The damages would be assets of the estate, and, therefore, Thomas, as successor of Routt and wife in the administration, properly succeeded as plaintiff in this suit.—13 Ala. 237. The record shows, that the defendants were before the court, when the cause was revived in Thomas' name and continued by him: then was the proper time to contest his right to be made a party.—2 Ala. 150. Defendant, by not contesting, admitted his right to become a party, and this cures all error. *Consensus tollit errorem.*—14 Ala. 294; 6 Ala. 58; 1 Porter 26; 3 Ala. 581; 20 Ala. 303. Defendants' consent is not matter of mere inference or presumption; the minute entry shows, that they participated with the plaintiff in effecting a revival. Their failure to contest the revival at the time it was effected, and their subsequent appearance and continuance, were so many recognitions of Thomas' right to prosecute the suit, and admissions that it was properly revived; the plaintiff acted on these admissions, and they are, therefore, conclusive against the defendants.—22 Ala. 436. 2. There was no discontinuance, in the strict technical sense of that term, for the defendants were not "without a day" in court; but, if there was, it was waived by the defendants' appearance, continuing the case after revival, pleading, &c.—1 Bouv. Law Dic., titles, "Continuance" and "Discontinuance, 338, 472; 1 Tom. *ib.* 560; 9 Porter 520. The case was continued "on the application and showing of the defendants," at the second term after the revival, and they thereby waived the prior discontinuance, if any existed.—Minor's R. 137. 3. They, also, waived error (if any) in the ruling of the court refusing to dismiss, by not excepting to its action at the time.—17 Ala. 816; 22 Ala. 690. 4. The revival in the name of Thomas, as administrator, might have been pleaded in abatement, and, hence, is no cause of error.—Bacon's Abr., "Abatement K," "Error K, 5;" 1 Comyn's Dig. [*159], (I, 36); 3 *ib.* [*581]; Gould's Plead., ch. v,

§§ 153, 79; 3 Ala. 609; 20 *ib.* 236; 20 Ala. 273. 5. The court had no discretionary power to deprive the plaintiff of the benefit of defendants' waiver.—22 Ala. 524.

II. Plaintiff's demurrer to the plea in abatement was properly sustained. The plea was bad: 1. Plaintiff may declare as executor or administrator, though the process only describe him generally. The writ is only the process to bring the defendant into court: the declaration shows the character in which the plaintiff sues, and the defendant is sued, and if the latter is correct, it suffices.—3 Wilson 141; 2 Strange 1232; 4 Burrow 2417; 2 Cowper 455. 2. The plea was bad in form, (which is substance—Elmes & Co. v. McKenzie, 5 Ala. 617; 22 Ala. 500); because it defends "the wrong and injury," when it should have been "force and injury," as the action was trespass.—Steph. Plead. 434, 479; 1 Chitty's Plead. 231, 460, 463; 3 *ib.* 892. 3. It was bad in not praying "judgment of the writ and declaration," in the beginning, as well as the conclusion, of the plea, as it was for matter apparent on the face of the writ.—1 Tidd's Prac. 637; 1 Comyn's Digest [*144,] (I 12); 3 Saund. 209 a, note 1, and 209 d, note; 2 B. & P. 420; 5 Mod. 132, 144; 12 Mod. 525. 4. And whether good or bad, defendants waived their objection to the demurrer, and acquiesced in the court's judgment, by pleading over.—Minor 178; 1 Stew. 45, 141; 2 Stewart 372, 443; 7 Porter 34; 5 Mass. 266; 11 Pick. 221; 1 Marsh. 592; 1 Comyn's Digest [*146], (I 13). Defendants waived error, also, by not specially excepting to the action of the court sustaining the demurrer. 17 Ala. 816; 22 Ala. 690.

III. The court properly sustained plaintiff's demurrer to the defendants' second plea to the merits and in bar; because: 1. The plea contained no matter of legal justification. If the negro was guilty, as alleged, the law provided a mode of redress, and defendants had no legal right to punish him, unless plaintiff consented, and this plea does not aver plaintiff's consent. Under the general issue, they might, perhaps, have proved the averments of the plea in mitigation of damages, but they were no defence to the action. 2. The plea was objectionable for duplicity, being in the alternative. 3. Defendants did not specially except to the action of the court sustaining the demurrer, and, therefore, waived error.—17 Ala. 816; 22 *ib.* 690.

IV. The motion to exclude the part of Dale's testimony objected to, was properly overruled. 1. If any part of it was illegal, the defendants were bound to specify it; and if they objected to the whole as illegal, they should have stated the grounds of objection, or shown the facts and circumstances rendering it illegal. It was clearly admissible to prove, that "said negro slave, Lewis," was "the property of Alexander Jeffries, deceased," as well as the date and *locum in quo* of the alleged trespass. The court was not bound to separate the legal from the illegal, and grant the motion in part, and, therefore, rightly rejected it *in toto*.—7 Ala. 269; 17 *ib.* 378; 20 *ib.* 392; *ib.* 828; 22 Ala. 422. 2. The part of the answer asked to be stricken out, is strictly responsive to the interrogatory; and as the interrogatory was not objected to, the answer is admissible. Defendants ought to have objected to the interrogatory, if the matter naturally elicited by it would be objectionable. In not objecting, they took the chances for a response favorable to themselves, and should not be allowed to object, now that it has turned out unfavorable. 3. If the court erred, it was error without injury; for the record discloses a good cause of action, and fully demonstrates the trespass, with or without the testimony asked to be excluded, and this court will not reverse for such error.—Decisions of this court, *passim*.

LIGON, J.—There was no error in overruling the motion of the defendants to dismiss the suit, on account of a supposed discontinuance, because the names of Routt and wife, as executor and executrix, had ceased to be used as plaintiffs, and that of Thomas, as administrator, had been substituted on the record before the motion was made. The defendants were in court, and consenting to the order made at the August term, 1850, by which Thomas was substituted for Routt and wife as plaintiff, and at a subsequent term, the case was continued on their motion; and they will not be allowed, after both their agency in making Thomas a party, and their long acquiescence in the order by which he was admitted to prosecute the suit as plaintiff, to object to the order by which he was made a party. The objection should have been taken at the time he was proposed to be substituted for the original plaintiffs, if such substitution were irreg-

ular; as it was not, it must be considered as waived. There was no discontinuance of the suit, as it was regularly continued from term to term from its commencement to the final trial in the court below.

If there was a change in the administration of Jeffries' estate, as the record clearly indicates, between the commencement of the action and the time at which the order was made admitting Thomas, administrator of Jeffries, as a party plaintiff, we could not say there was error in his becoming such. On the contrary, such an order is fully authorized by our statute (Clay's Digest 227 § 30); for the declaration clearly shows, that the wrong complained of was committed upon a slave belonging to the estate of the testator, and the amount of damages recovered will be assets of the estate. It was proper, therefore, that the suit should be brought and prosecuted in the name of his personal representative; and if, during its pendency, there was a change of representatives, there may also be a change in the party plaintiff to the suit.—Graham v. Grant, 12 Ala. 105; King & Clarke v. Griffin, 6 Ala. 387.

Neither was there any error in sustaining the demurrer to the plea in abatement. There is no such variance between the writ and declaration, in legal effect, as would hinder the former from being amended, on motion, and where this is the case a plea in abatement, if demurred to, will not be allowed. Caldwell v. The Branch Bank at Mobile, 11 Ala. R. 549.—Pleas in abatement are never favored by the courts, and in them matters of form become matters of substance; and if they are technically deficient in form, a demurrer will be sustained. The plea here undertakes to defend "the wrong and injury," when the action is trespass, and the books require the form of defence to be to "the force and injury."—20 Ala. R. 404; Elmes & Co. v. McKenzie, 5 Ala. 617; Stephens' Plead. 434–479; Chit. Pl. 231, 460, 463.

The third error assigned is predicated upon the ruling of the court on the objection of the defendants to a portion of the testimony of the witness Dale. The answer, a portion of which was objected to, is directly responsive to the question. It appears that the interrogatories were served upon the counsel of the defendant, who took no exceptions to them at

any time. If a party fail to object to a question when asked, it seems, he will not be allowed to object to the answer when made, if it directly respond to the question, which is the case here. Were the rule otherwise, it would give the party the advantage of the answer, if it was favorable to him, and the right to exclude if it was unfavorable—a privilege which neither common justice nor the rules of evidence will extend to him.—Anderson v. Snow & Co., 9 Ala. 247 ; Bradford v. Haggerthy, 11 Ala. 698.

The question is, "Did you not see said defendants, or either of them, commit any trespass, about the last time named, on any slave?" To this the witness replied, "I did see them commit a trespass on said negro slave, Lewis," &c. The question itself was objectionable ; but, as that was permitted to pass without exception, the plaintiff was entitled to an answer, and if that answer was responsive, it was too late for the defendants to object to it. The opinion of the witness, however, seems to be fully justified by the facts which he discloses in the same answer, as he goes on to state that the defendants inflicted a most cruel whipping upon the slave, without authority, or even well founded excuse, for so doing.

There was no error in sustaining the demurrer to the second plea of the defendants. The matter of that plea, in the manner in which it is therein set forth, forms no bar to the action ; at most, it could only tend to mitigate the damages. No person has the right to inflict chastisement on his neighbor's slave, without the consent of the owner, unless such authority is given him by statute, as in the case of patrols, and on his own premises when such slave is found there without the permission of his master or overseer, &c. ; and even in these cases, the plea, to be good, should set out and aver the authority under which the party acted. When acting with the warrant of law, the party may forfeit its protection, if the chastisement inflicted by him is cruel and excessive.

There is no error in the record, and the judgment is affirmed.

WRAY *vs.* COX.

1. The husband is liable, in *assumpsit*, for necessaries furnished to the wife (she being separated from him without fault on her part) while confined in a lunatic asylum, although the credit for them was given to the person who, as agent for plaintiff, made the contract, and paid the expenses, which were afterwards repaid to him by his principal; but if the person who made the contract was acting for himself individually, and not as agent of the plaintiff, the latter cannot, by voluntarily paying the debt, make the husband his debtor.

APPEAL to the Circuit Court of Macon.

Tried before the Hon. ANDREW B. MOORE.

ASSUMPSIT by Mary D. Cox against Albert G. Wray, on the common counts. On the trial, as appears from the bill of exceptions, the plaintiff, who was the defendant's mother-in-law, "introduced evidence that Susan M. Wray, defendant's wife, was sent to her house in October, 1848, by the defendant; that Mrs. Wray was insane when she arrived at plaintiff's house, and so continued from that time during the years 1849 and 1850; that during these periods she was separated from her husband, who advanced neither money nor necessaries for her support after July, 1850, and none before except as hereinafter stated; that Mrs. Wray was examined by physicians, at the request of plaintiff and her son, Simpson H. Cox, the brother of Mrs Wray, who gave their opinion that, in her situation, some lunatic asylum was the proper and necessary place for her; and accordingly she was placed in the lunatic asylum at Columbia, South Carolina, on the 26th of April, 1849, and remained there until December, 1850; that plaintiff paid to the agent of the asylum the money sought to be recovered, for necessary board, attention and supplies furnished to Mrs. Wray at the asylum during the years 1849 and 1850, and that they were compatible with the means and circumstances of the defendant. The only evidence on the subject of the contract, and the reason and mode of the payments by plaintiff, was the testimony of Simpson H. Cox and Dr. J. W. Parker, the agent of the asylum, both of whom were examined by interrogatories,

and is to be found in the answer of said Cox to the second cross interrogatory by defendant, and the answer of Dr. Parker to the first and third cross interrogatories by defendant."

The answer of said Cox to the second cross interrogatory is as follows: "He is not interested in said suit; if plaintiff succeeds, witness expects nothing; there was no understanding between witness and plaintiff at no time; witness and plaintiff advanced the money as it was wanted and demanded; and the reason why these amounts were so advanced (was), that plaintiff had not the means, at times, when the money was wanted, and then witness advanced the money himself: both claim in the same period, that is, 1849 and 1850."

The answer of Dr. Parker to the first cross interrogatory is as follows: "He was made acquainted with Mrs. Susan M. Wray by Judge Carlton and Brailsford, who brought her to the asylum, and also by a certificate from two physicians and a magistrate, and by letters from Simpson H. Cox, Dr. Sims and others. *Mrs.* Wray was not present on her admission. I inquired whether she had a husband living, and particularly whether she was brought to the asylum with his consent." His answer to the third cross interrogatory is as follows: "Mrs. Wray's expenses were not higher than the amount charged for all of that class of patients, whose circumstances and former associations authorized their being kept distinct from the rude and vulgar. She was, at times, under great excitement, requiring careful watching; and not unfrequently it was found necessary for her safety that she should be restrained in a recumbent posture on her bed. She was admitted April 26, 1849, and removed December 4, 1850. She was received into the asylum *of* Simpson H. Cox's responsibility, and we looked to him for payment."

"To rebut evidence of the defendant, the plaintiff offered evidence of Mrs. Wray's insanity from 1844 to the time of her arrival at her mother's in 1848; and also offered evidence of the defendant's property, and means, and the value of the same, and that it justified the amount and nature of the necessaries furnished to his wife at the asylum. The defendant offered evidence that Mrs. Wray was of sound mind in the fall of the year 1848, and that, while of sound mind, she committed adultery with a man named Prime, and on that account

he sent her to her mother's in October, 1848; that he furnished her, when she left his house, with $300, and sent with her two servants, whose hire was worth $200 *per annum*; that out of this money her travelling expenses were to be paid, which was done, and the remainder was given to her when at the end of her journey; that under some orders on the application of Mrs. Wray for alimony *pendente lite*, in a suit in chancery brought by Wray against his wife for a divorce, he paid $300 to her in July, 1849, and $350 in July, 1850; that he had had no communication with her since their separation in 1848. There was no evidence that he had made any agreement with any one to furnish Mrs. Wray with necessaries, or to advance money for this purpose, or that she was (*sent to ?*) the asylum at his request; but the evidence was, that this was done without his concurrence, or having anything to do with it, or that he had promised plaintiff to pay the money advanced by her.

"The court charged the jury, after sundry charges not excepted to, that, if Simpson H. Cox carried Mrs. Wray to the asylum, and made the contracts with the agents to supply her board and other things needed by her, and that he would pay for them, and they were supplied at the asylum, and were necessary in her situation, and compatible with the defendant's means, and Simpson H. Cox refused to pay, and the plaintiff advanced the money, she is entitled to recover what she so paid, if Mrs. Wray was insane, and it was proper and necessary that she should be placed at the asylum, and if she was sent off by her husband without justifiable cause; to which charge defendant excepted.

"The defendant asked of the court the following charges:

"1. If the plaintiff paid this money to the agent of the asylum on a contract made with said agent by Simpson H. Cox, and not on a contract made by her with said agent, then plaintiff cannot recover; which charge the court gave, but with this addition or qualification: unless there was an agreement between Simpson H. Cox and plaintiff, that he was to take Mrs. Wray to the asylum, and plaintiff was to pay her necessary expenses there; in which event she could recover, if the money was paid for necessaries.

"2. That it would make no matter what arrangement or contracts were made between Simpson H. Cox and the plaintiff.

about paying the money agreed to be paid at the asylum, if the jury believe the testimony of Dr. Parker, and that Simpson H. Cox, and not the plaintiff, made the contract with Dr. Parker, and became responsible for the money to be paid; which charge the court gave, but with the same qualification as above.

"3. That, if plaintiff paid to the agent of the asylum the money sought to be recovered, for board and other necessaries furnished to Mrs. Wray by that institution, she cannot recover; which charge the court gave as asked, but with this addition: that, if the amount so paid was required to furnish the necessary board and supplies for Mrs. Wray, then plaintiff can recover.

"4. That, if the jury believe that Dr. Parker told the truth, and such was the fact, when he swore that Mrs. Wray "was received into the asylum of Simpson H. Cox's responsibility, and we looked to him for payment," then plaintiff cannot recover, if the money was paid by her to the agent of the asylum on this contract; which charge the court gave as asked, but with this qualification: unless there was an agreement between Simpson H. Cox and the plaintiff, that he was to take Mrs. Wray to the asylum, and she was to pay the money required for her necessary expenses; in which event she could recover, if the money was paid for such necessary expenses."

The defendant excepted to the charge given, and to the several qualifications added to the charges asked; and he now assigns for error these several rulings of the court.

Geo. W. Gunn, Elmore & Yancey, and Belser & Rice, for appellant:

1. The husband is bound by the wife's purchase of necessaries. This obligation arises from his duty to furnish them, and from her presumed agency, while they cohabit.—2 Roper (H. & W.) margin 110, 111, 114, top 70, 67, 68; Chitty on Contracts, 161; Hughes v. Chadwick, 6 Ala. 651; 2 Bacon's Abr., Baron & Feme, H. 38, 39, 40.

2. In such cases, the contract is not that of the wife, having inherent power as such to bind the husband, but is the contract of the husband, through the wife, because of the presumed agency.—Chitty on Contracts, 161; 2 Bacon's Abr. 40; Manby v. Scott, decided by the twelve judges, who all agreed on this point, 1 Mod. 124.

3. This agency arises from the cohabitation; when, therefore, she leaves his house of her own accord, the law does not continue her presumed agency or authority even to buy necessaries. —2 Roper (margin 114) 70; Chitty on Contracts, 172; Manby v. Scott, *supra.*

4. The authority to the wife is to purchase necessaries only, and it follows that she cannot borrow money to buy the necessaries with.—2 Bacon's Abr. 47; 2 Roper (margin 112) top 69; Chitty on Contracts 169.

5. It also follows, that, if the credit be not given to the husband, but the necessaries are furnished on the credit of the wife, the husband is not liable.—2 Bacon's Abr. 46; 2 Roper (see note margin 111) top 68; Chitty on Contracts 163; 8 Wendell 544; 8 Johnson 72; 10 *ib.* 38; 12 *ib.* 293; 11 Wendell 33; 3 Campbell 22; 5 Taunton 356. The law never implies a contract to pay for any thing by A, when there is an express contract by B to pay for the same thing. No agreement or contract between Mrs. Cox and her son, can create any right of action in her as against Wray, although she afterwards voluntarily paid for the necessaries.—Fortune v. Brazier, 10 Ala. R. 791.

6. It further follows, that, if the credit be given not to the husband but to a third person, the husband is not liable to the person furnishing the necessaries, and is not liable to the person upon whose credit the necessaries are furnished.—Rutherford v. Coxe, 11 Missouri R. 347.

7. In connection with the above propositions, we rely on the following: that one person cannot make another his debtor without his consent.—Kenan v. Holloway, 16 Ala. 53; Chenault's Adm'rs v. Walker, 22 Ala.; 5 Ala. 262; Westmoreland v. Davis, 1 Ala. 299.

Applying the above principles to the case, it is evident that the first charge given by the court was wrong, as it assumes that, without any privity between the plaintiff and defendant, or any privity between the plaintiff and the agent of the asylum, or any between her and her son, Simpson H. Cox, she could pay the money agreed to be paid by her son, on his refusal to do so, and thus make the defendant liable to her for the same.

The second charge given, with the addition or qualification,

was also wrong. The bill of exceptions shows all the testimony in relation to the agreements between Mrs. Cox and her son, or between either of them and the agent of the asylum. There is no evidence to be found in it of any agreement on Mrs. Cox's part to pay for Mrs. Wray's expenses; and the charge was, therefore, abstract, and calculated to mislead the jury. The third and fifth charges are liable to the same objection.—Carey v. Hughes, 17 Ala. R. 388; Stephens v. Brodnax, 5 Ala. 259.

But the propositions contained in the second, third, fourth and fifth charges as given, with the qualifications, or additions, are directly at variance with the principles of law as settled by the authorities quoted above.

D. G. Clopton, *contra*:

I. Where husband and wife live apart, without fault on the part of the wife, any person who buys necessaries and furnishes the wife with them, can recover the amount from the husband. 1 Salk. 386; 4 Greenl. 261; 14 Mass. 227; 10 Ohio 365.

II. When a husband turns his wife out of doors, without cause, he gives her credit to the extent of procuring necessaries, and is liable to any person who may furnish them. A contract, made by Simpson H. Cox with the asylum, is not a contract with Wray. Hence, if S. H. Cox refused to advance the money to the asylum, and Mrs Cox advanced the same, the contract between S. H. Cox and the asylum cannot effect Wray's liability to Mrs. Cox. A contrary doctrine would, virtually, be leaving the wife to the voluntary charity of the world.

III. This is not the case of a subsequent payment, after the necessaries had been furnished. The bill of exceptions does not show such to be the fact; and, in the absence of the fact being shown by the bill of exceptions, the court will draw all reasonable intendments to sustain the charge. By this rule, the court will infer that advance payments were required by the asylum, and this inference is also authorized by the testimony: for Simpson H. Cox in his testimony, says that both witness and plaintiff advanced the money as it was required and demanded.

If there was an agreement between plaintiff and S. H. Cox that he was to take Mrs. Wray to the asylum, and she would

pay her expenses whilst there, then he was only Mrs. Cox's agent, and she would be bound to the asylum, although S. H. Cox's agency was not known to the agents of the asylum.

GOLDTHWAITE, J.—The contract of marriage carries with it certain incidents, one of which is, that the husband shall supply the wife with necessaries. If he fails to perform this duty, which grows out of this relation, without fault on the part of the wife, any other person may do it, and hold the husband responsible.—Jenkins v. Tucker, 1 H. B. 361; Ambrose v. Kerrison, 4 Eng. L. & E. Rep. 361; Read v. Legard, *ib.* 523. In such case, the marriage operates as a general letter of credit to the wife, for necessaries; and it makes not the slightest difference, whether a tradesman supplied the articles, or whether any other person provides her with them, by buying them, or contracting for them on a credit. If it were otherwise, where the husband was not known, the wife might starve, as no person having the articles she stood in need of might be willing to let her have them on the credit of her husband. In the present case it is conceded, that the provision made for the wife while in the lunatic asylum, was necessary for her, so that no question arises upon that point; and we think, upon the principles we have stated, that, if any person had contracted for her reasonable expenses while there, the husband would be liable. So, also, if any one acting for another, took her to the asylum, and made the contract, it would make no difference, in law, that the credit was given to him, or that he paid the expenses. He would be acting for his principal, who, by paying or refunding the amount paid by the agent, would be, in law, the party furnishing the necessaries, and the husband would be liable to him. But if the wife contracted a debt for necessaries, it would be the debt of the husband, and a third person could not, by voluntarily paying it, make the husband his debtor. So, in this case, if the brother of Mrs. Wray made the contract, acting for himself, and not for the plaintiff, and the latter voluntarily paid the debt, we do not see how she could recover. The first charge was, therefore, wrong, as it in effect instructed the jury, that, if the plaintiff paid the debt, she could recover, although it was contracted by another person acting for himself alone.

We see no error in the other charges, the qualifications to which brought them within the law as we have stated it.

Judgment reversed, and cause remanded.

STEIN *vs.* McARDLE & WATERS.

1. The lessee of a two storied house in Mobile, having sub-let the second story to a club, with which he had no connection whatever, was held not liable, under the by-laws regulating the City Water Works, for the water rates assessed against the occupants of the second story.
2. Where the demand in suit is under $20, both parties being competent witnesses for every purpose, it is discretionary with the court to permit plaintiff to be re-examined for the purpose of rebutting the testimony of one of defendant's witnesses.

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

McARDLE & WATERS brought suit, before a justice of the peace, against Albert Stein, the proprietor of the City Water Works of Mobile, for neglecting and refusing to furnish a supply of water, after a tender of the water rent. The facts of the case appear in the opinion of the court. The justice rendered judgment for the plaintiffs, and the defendant appealed to the Circuit Court, where judgment was again rendered against him. To reverse this judgment he now prosecutes this writ of error, and assigns for error the judgment of the court below.

F. S. BLOUNT and C. W. RAPIER, for plaintiff in error.

PERCY WALKER, *contra*.

PHELAN, J.—By the act of January 7, 1841, (Acts of 1840-1, p. 53,) and an agreement previously entered into with the Corporation of Mobile, Albert Stein became vested with all the rights and immunities of the Mobile "Aqueduct Company," as chartered in 1820, and amended in 1837, and subject to all

the duties to which, by law, that company was subject; the principal of which was, to supply such of the citizens of Mobile with water as would observe all reasonable and proper by-laws and regulations, and pay the lawful rates.

By-law No. 3 contains this provision: "No proprietor, or occupant of a house or lot, will be supplied with water, when the hydrant cannot be placed perfectly secure, so as to prevent access to the same by other families or persons; or if not kept properly secured, the supply will be stopped, and the amount of payment forfeited."

By-law No. 7 contains this provision: "When two or more families or persons, are supplied from the same pipe, the whole will be assessed in one joint account," &c. All water rent is required to be prepaid for one year.

It seems that McArdle & Waters were the lessees of a two storied building, situated on the corner of Government and Royal streets, Mobile, for one year from 1st of November, 1851, and that they sub-let the second story to the "Social Club," having no connection whatever with the club, and having no authority to enter their apartment, except once a month to demand the rent. In the lower story, McArdle & Waters kept a coffee-house establishment.

The water rent was assessed for this house, 1st of November, 1851, at $55, to-wit: for the club room, $20, and for the coffee house, $35, and a copy of the "By-Laws and Regulations of the Mobile Water Works" was furnished to the defendants in error.

Subsequent to the time when the water rent was due by law, the agent of Stein demanded it of McArdle & Waters, who offered to pay $35 for the coffee house, and made a legal tender of that amount, but refused to pay the $20 for the club room. The agent of Stein refused to receive the $35, and, after some unsuccessful efforts to collect the $20 of the club, and the continued refusal of defendants in error to pay the entire $55, the plaintiff in error stopped off the supply of water from the house; and for this alleged breach of his implied contract, in not furnishing water, the defendants in error brought suit.

The liability of Stein to this action must depend altogether upon the validity of by-law No. 7, before quoted, since it is

shown that McArdle & Waters had full knowledge of the existence of said by-law, at the time they made application for water. And the validity of that by-law must depend upon its reasonableness; for every by-law of this corporation, by the terms of its charter, must be conformable to the laws of the State and of the U. States; and by the nature of its very constitution, it must also be conformable to common justice and reason.—Angell & Ames 289 *et seq.*

By-law No. 3, quoted above, considering the nature of the obligation devolving upon the corporation, namely, the supply of water to the city for just compensation, is altogether reasonable; because, if hydrants cannot be placed in a state of reasonable security, against waste or trespass, there could be no sufficient guaranty of a supply of water to the city, or of protection to the proprietor of the Water Works.

But by-law No. 7, if it be construed to mean that no person or family, living on the same premises with another person or family, in distinct portions or apartments of the house or premises, and having no business connection with that other, shall be allowed to have a supply of water upon tendering the lawful compensation, without also tendering or paying for a supply of water to that other, is not reasonable, but unjust and oppressive, and for that cause is not lawful, but may be treated as a nullity, unless it can be shown that more than one hydrant cannot be arranged for said house or premises, at a reasonable cost.

This brings us to a question of fact: Could the coffee house in the lower story be conveniently supplied with water, at a reasonable cost, without letting the water flow to the second story? Of this we can have no doubt. Say that but one service-pipe, leading from the main pipe in the street, can be afforded to the same house or premises, ordinarily, and but one stop-cock, to be placed between the main pipe and the hydrant or hydrants. Nothing surely can be easier, than to provide, at a moderate cost, for adding or detaching the part of the pipe which supplies a second story in the same building, to or from that part which supplies the first story; and it is not reasonable, therefore, to say that those who occupy the first story of a building, distinct from those who occupy the second, or third, or fourth story, shall not have a supply of water without paying or being liable to pay for all. The difficulty of putting a hydrant in a

proper state of security, in an upper story, against depredations from below, is admitted to be greater; but that case is not made by this record, and we make no decision further than the case goes.

We agree, therefore, with the court below, that if McArdle & Waters tendered to the plaintiff in error the amount to which their own hydrant in the lower story was assessed, he was bound to furnish them a supply of water, and if he neglected or refused to do so, he is liable to an action for damages.

The court permitted McArdle, one of the plaintiffs, after he had testified in chief, to be re-examined, to rebut or contradict the testimony of Cumming, one of defendant's witnesses. The demand was for less than $20, and the statute makes both parties witnesses for every purpose, and subject to the same rules which govern other witnesses. It was a pure matter of discretion in the court to permit him to be re-examined, and it was as competent to do this to rebut, as for any other purpose.—Clay's Digest 360 § 12.

The judgment below is affirmed.

SALTMARSH ET AL. *vs.* CROMMELIN.

1. One who is in possession of lands under a deed purporting to convey them to him, especially when livery of seizin accompanied the delivery of the deed, has color of title, and may, when sued in trespass by a patentee from the United States, contest the validity of plaintiff's patent.

ERROR to the Circuit Court of Coosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

TRESPASS TO TRY TITLES by William T. Minter, Hiram F. Saltmarsh and Ashley Parker, against Charles Crommelin, tenant in possession. The plaintiffs below, to make out their title, offered in evidence a patent from the United States to themselves, as the assignees of Isham Bilberry and Samuel Lee, "for the south-east fractional quarter of fractional section

twenty-four, in township eighteen, of range eighteen, in the district of lands subject to sale at Cahaba;" and then proved that the *locus in quo* was once in the possession of Tallassee Fixico, an Indian reservee; and that he voluntarily abandoned the lands about the year 1828, and removed beyond the Mississippi river in 1836 with his tribe, the Creeks.

The defendant, to show title or color of title in himself, offered in evidence the certificate of reservation, and permission to occupy the premises, from the United States to said Tallassee Fixico. This proof was made by a copy of said certificate, the loss of the original and the truth of the copy offered having been shown. He also offered in evidence two deeds for the said lands, from George Taylor and others to himself, one dated the 12th, and the other the 14th of July, 1834; also, a copy of the original entry on the books of the General Land Office, purporting to be a proceeding at the Land Office at Cahaba, by which the said Bilberry and Lee entered said lands. This certificate is headed as follows: "Floats Pre-emption Act, 1834. No. 35014. Land Office, Cahaba, June 4, 1839. It is hereby certified," &c. On the back of this certificate is the written assignment of said Bilberry and Lee, dated June 4, 1839, conveying all their interest and title in and to the lands therein described to the plaintiffs, and requesting that a patent might be issued in their name. The patent which was issued on this certificate was offered in evidence by the plaintiffs, and is set out at length in the former report of this case. See 9 Ala. 594.

The defendant offered evidence tending to show, that Geo. Taylor, one of the grantors in the two deeds above referred to, purchased the possession of said lands, in 1828, from said Tallassee Fixico, and received possession from him at the time of the purchase; that defendant received possession, at the time of his purchase and the execution of said deeds, from his said grantors, and had ever since continued in possession. There was no evidence showing, or tending to show, that either said Bilberry and Lee or said plaintiffs were ever in possession of said land, other than the certificate and patent above described.

The court charged the jury as follows:

"1. That, if they found the defendant held for a series of years, and continued to hold, possession, under deeds from Tay-

lor, and that Taylor held possession under Tallassee Fixico, and that the plaintiffs were never in possession, then defendant held under color of title, and was in condition to contest the validity of the patent.

"2. That the certificate of possession, which issued to Tallassee Fixico, was an appropriation of the land by the Government of the United States to a particular purpose; and that, if Tallassee Fixico, in 1828 or 1829, abandoned said land, it was not subject to entry under the pre-emption laws; that the patent, under which the plaintiffs claimed title, was issued under the pre-emption laws of the United States; that the land conveyed by said patent was not subject to entry under pre-emption; that said patent had issued contrary to law, and was void.

"To the admission of said copy certificates and deeds, as evidence for the defendant, and to the charge given, the plaintiffs excepted;" and they now assign these rulings of the court for error.

Morgan & Walker, for plaintiffs in error:

The defendant claims under a void grant. "A fraction in section 24," &c., is not a legal sub-division of land; and the grant does not designate any particular land in that section, nor does it specify the metes and bounds, nor the number of acres. 5 Iredell's Eq. R. 373; 14 Mass. R. 200; 13 Johns. 97; 13 S. & M. 317; Bac. Abr., vol. 4, p. 521; Com. Dig., Grant.

It is an attempt to convey a right of pre-emption, and is therefore void. The deed is a mere quit-claim; and Crommelin is not to be considered in the light of a purchaser for valuable consideration: he had notice, on the face of his deeds, that his vendors had no title, and that the conveyance was a mere effort to clothe him with a pre-emption claim to the land. How can such deeds, under such circumstances, give color of title?—McElyea v. Hayter, 2 Porter 148; Cundiff v. Orms, 7 *ib.* 58; Tenison v. Martin, 13 Ala. 21; Oliver v. Piatt, 3 How. U. S. R. 333.

The defendant is a mere stranger to the title, and cannot dispute the validity of the patent under which the plaintiffs claim. Masters v. Easters, 3 Porter 368; Jones v. Inge, 5 *ib.* 327; Cobb v. Mitchell, 13 Ala. 137; Cruise v. Riddle, 21 Ala.

The attempt seems to have been to connect the defendant with

Tallassee Fixico, so as to place him in a condition to assail the plaintiffs' title; and this was superinduced by a remark made in the previous decision of this cause, that no such attempt had been made. It was not then decided, that it could have been done, if the attempt had been made, or, if accomplished, that it would avail the defendant in any view of the case. If the former decision is the law of this case, and if the reservee, by a sale or voluntary abandonment of the land, lost all claim to it, how could the purchaser from him acquire any right to the land, or the occupation of it?

It is a mistake into which the court was led when this case was before it, as published in 9th Ala., that the plaintiffs claim under the pre-emption law of May 29, 1830: the patent issued under the act of April 24, 1820. But if this is not so, the certificate of possession to Tallassee Fixico was void for uncertainty, and he was never located in conformity with the act of March 3, 1817.—U. S. Statutes at Large, vol. 3, p. 382.

A patent from the United States is, of itself, evidence that it was issued under legal authority.—Goodlet v. Smithson, 5 Porter 245.

Elmore & Yancey, *contra*:

The exception taken to the admission of Crommelin's deeds was a general one, and cannot be sustained if they were relevant.—Price v. Br. Bank Decatur, 17 Ala. 374. The deeds were part of the chain of title from Tallassee Fixico, which gave Crommelin that color of title which was essential to a defence against the plaintiffs' patent.—9 Ala. 594. All intendments will be made in favor of the judgment below, and therefore that the deeds were properly proven.—Knapp v. McBryde, 7 Ala. 20.

Tallassee Fixico's certificate of possession, being for the same land, was relevant, to show color of title in Crommelin, in connection with Taylor's deeds.—9 Ala. 594. That certificate was evidence, see Clay's Digest, p. 341, § 157. The original being lost, a certified copy from the Land Office was the next best evidence.—Hines v. Greenlee, 3 Ala. 73. The copy certificate of Bilberry & Lee was relevant, to prove that the patent was issued under pre-emption laws.

The charges given were based upon the evidence, and were a

correct exposition of the law.—U. S. Statutes at Large, vol. 4, 420; 9 Ala. 594; 2 How. 284; 3 Ala. 47; 13 Port. 498.

The patent cannot give title under the act of 1820; because the record does not show (and the court will presume nothing against the judgment) that said lands had ever been authorized to be sold; no entry could be made under that act, unless there had been an authorization of sale of the land. The patent refers, in its body, to the certificate of Bilberry & Lee, and that certificate can alone determine under what act it issued: it issued under the pre-emption act of 1834.

Whether Crommelin's deeds were champertous, or Tallassee Fixico's certificate invalid, matters not: they are sufficient to constitute color of title, and enable Crommelin to contest the patent. The land in Tallassee Fixico's certificate is described as "a fraction of a section on the east side of Coosa river," and that is sufficiently certain. Besides, there was proof that the lands occupied by Tallassee Fixico were the lands in controversy.

GIBBONS, J.—When this case was before this court on a former occasion, the opinion then pronounced, if we rightly comprehend it, disposes of nearly every question presented by the present record, except one, and that is, whether the defendant is to be considered as holding under color of title, or is he a mere trespasser.—*Vide* Crommelin v. Minter, 9 Ala. 594. In this case, it is decided, 1st, that when an Indian reservation, under the treaty of 1814 with the Creek Nation, is sold by the Indian, it at once becomes a part of the public domain of the United States, without any act whatever on the part of the United States being necessary to be done, or any assertion of right on the part of the government; 2nd, that, though the title in such reserves be vested in the United States by the voluntary abandonment of the reservee, still, it is not subject to entry under the pre-emption laws of Congress; and, 3rd, that a patent fraudulently obtained, or one which has issued in violation of law, is void, and does not authorize a recovery against a party in possession under color of title. But a mere intruder cannot insist upon the invalidity of the patent; and if the defendant offers no evidence to justify his possession, the fair inference is, that he is an intruder. In that case, the

defendant offered no evidence whatever as to how he derived his title; and the court determined, under such circumstances, that they were bound to consider him as an intruder. In the present record, the defendant has connected himself directly with the Indian reservee, Tallassee Fixico; and the question now arises, whether, under the principles already settled in the cause, the defendant is to be considered as holding under color of title or not.

Without undertaking, at the present time, to give an accurate definition of the term "color of title," we deem it sufficient for the present case to say, that it is that apparent right in the tenant, which he has derived by his paper title, which distinguishes him from the naked trespasser or intruder. He who holds under a paper title, therefore, which apparently gives him a right to the land, which would lead an honest mind to the conclusion that the right to the land passed by the deed, and more especially when the delivery of the deed is accompanied by livery of seizin, or possession of the premises purporting to be conveyed, must be considered as holding under *color* of title.

The right to occupy and hold the premises in question, is conceded by both parties to have been in the Indian reservee, Tallassee Fixico. This right he derived from the government itself. The proof shows, that one Taylor purchased this right of Tallassee Fixico, doubtless both parties to the transaction supposing that his rights were alienable, and conveyed by deed made by himself and others the same premises to the defendant. The purchase both from the reservee and from Taylor is accompanied by a change of possession of the land, thus evincing the *bona fides* of the parties to the transaction. The defendant's possession, held as it is under the deeds in evidence, and being traced back to the reservee, must be considered, in our opinion, a possession under color of title. It may be conceded, that the defendant has no title to the premises, as against the government of the United States; yet it by no means follows, that his possession is not under color of right. We consider every one as holding under color of title, who enters *bona fide*, under and by virtue of a paper title; in other words, every one who is not a mere naked trespasser, and who is claiming in his own right under a paper title, is in under color of title. The

defendant, therefore, holding under color of title, under the previous decision of this court in this case, is in a position to call in question the validity of the plaintiff's patent; or, he may show an outstanding title in a third person, and thereby protect his own possession. There was, therefore, no error in the first charge of the court.

The second charge given to the jury, was simply an enunciation of one of the propositions argued by the court and decided in the decision above referred to. It must, therefore, be considered as free from error.

The third charge is simply a statement of fact from the evidence, and a conclusion of law arising upon it. It asserts, that the patent issued under the pre-emption laws of 1834; and inasmuch as it comprehends lands previously appropriated by the government to Tallassee Fixico, as an Indian reservation, therefore the patent is void. The fact that the patent was issued under the pre-emption laws, we think apparent from an inspection of the patent, and of the certificate upon which it issued. The court, therefore, committed no error in announcing this fact, apparent as it is upon the face of the papers themselves. And the conclusion of law is one based directly upon the decision of this court above referred to. There was, therefore, no error in this charge.

Exception was also taken to the admission of the copy certificates and deeds offered by the defendant in evidence. In the admission of this evidence we see no error. The proof of the loss of the original certificate was duly made, and also of its contents: and this, in our opinion, paved the way for the introduction of a copy. The deeds were also proper evidence, as conducing to show that the defendant held under color of title.

It is insisted, in argument, that the grant to Tallassee Fixico is void for uncertainty. We are of an opposite opinion; but the fact whether that grant is void or not, we do not consider as affecting the present case. The plaintiffs are confessedly suing for what was claimed and taken possession of under that grant, and that possession is traced down to the defendant, who derives his possession from a paper title in good faith; and that, as has been already stated, constitutes him a holder under color of title. In this character, he has the right to impeach the plaintiff's patent; and even conceding that the grant to

Tallassee Fixico was void for uncertainty, by the strict rules of law, yet the same results would follow, so far as regards the question as to the character of the defendant's tenure.

We find no error in the record, and the judgment of the court below is affirmed.

DOE EX DEM. BROWN & WIFE *vs.* CLEMENTS & HUNT.

1. A case having been taken from the Supreme Court of this State to the Supreme Court of the United States, the judgment was there reversed, and the cause remanded, but the certificate of reversal did not reach the former court until after the lapse of more than nine years: *Held*, that this did not operate a discontinuance of the cause.

MOTION for judgment in obedience to the mandate of the Supreme Court of the United States, reversing the judgment rendered by this court at the June term, 1843, and remanding the cause.

F. S. BLOUNT, for plaintiff in error.

DANIEL CHANDLER, *contra*.

CHILTON, C. J.—This court having rendered a judgment of affirmance in this cause, it was taken by the plaintiff in error to the Supreme Court of the United States, where the judgment of this court was reversed, and the cause ordered to be remanded for further proceedings. The judgment of reversal was rendered in December, 1844, but the mandate or certificate of reversal did not reach this court until recently, when the cause was ordered to be placed upon the docket.

It is insisted by the defendants in error, that we must presume, after the lapse of so long a period of time, that the parties have come to some arrangement and settlement of the litigation, and had determined to discontinue or abandon it, and that

the cause stands discontinued by operation of law. Our opinion is otherwise. It is the duty of the clerk of the Supreme Court of the United States, to forward to this court the evidence of the reversal of the judgment, in order that the cause may be disposed of in conformity to the decision of that court. If this evidence is delayed for a period short of that which would operate a bar of the right to proceed, it should not be allowed to prejudice the party who succeeded in the court above, nor does it relieve this court from the duty of carrying into execution the decree of the Supreme Court of the Union.

That the failure of the clerks to do their duty, in not placing causes on the docket, shall work no prejudice to the parties, was settled by this court in Wiswall v. Glidden, 4 Ala. R. 357, where it was held, that the omission of the clerk to place a claim of the trial of the right of property on the docket, until several terms had elapsed after the claim was put in, did not operate a discontinuance; and if the cause was stricken from the docket, a *mandamus* would lie to reinstate it.

As no ground, aside from that covered by the decision of the Appellate Court, is urged as a reason for adhering to the affirmance heretofore had in this court, we have nothing to do but to order the judgment of the Circuit Court to be reversed, and the cause to be remanded for further proceedings conformable to the views expressed in the opinion of the Federal Supreme Court.

Judgment accordingly.

SMITH ET AL. *vs.* PEARSON,

1. An absolute bill of sale of a slave decreed to stand only as a mortgage, upon proof that the vendor was upwards of seventy years old,—infirm,—embarrassed,—his property levied on, and about to be sold,—and that the vendee, who was his son-in-law, took advantage of all these circumstances to make the transaction assume the form of an absolute sale instead of a mortgage.
2. Equity will afford specific relief, such as a court of law cannot give, against an instrument which was executed on Sunday, but purporting on its face to

have been executed on Saturday, notwithstanding the instrument may also be void at law.

ERROR to the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by James A. Pearson against Isaac Smith and Isaac T. Smith, the latter of whom died during the progress of the suit, and his administrators were thereupon made parties. It charges, in substance, that said Isaac Smith agreed to lend to complainant the sum of about $200, for the payment of which the latter agreed to mortgage three slaves; that the money was advanced, but said Isaac T. Smith, who was the son of said Isaac, and the son-in-law of complainant, induced complainant, by false representations, and by imposing upon his ignorance and confidence, to believe that the proper way of arranging the matter was, to make an absolute bill of sale of the slaves, expressing therein the consideration of $600, and to let defendants give him their notes for the difference between that sum and the amount advanced by said Isaac; that the transaction was accordingly arranged in this way; that the bill of sale and the notes were both executed on Sunday, but, having been executed beforehand, purport to bear date on Saturday preceding. The prayer of the bill is for an account, redemption, and general relief.

The defendants answered, admitting the execution of the bill of sale and the note, insisting that the transaction was an absolute sale, and denying all fraud.

During the progress of the cause, the defendants moved to suppress the deposition of one Basil Adams, on the ground of improper conduct in the commissioner by whom it was taken; but the motion was overruled, and this constitutes one of the assignments of error. It is unnecessary, however, to notice this motion more particularly, as the decision of the court expresses no opinion upon its merits. It is also unnecessary to state the evidence in detail, as the conclusions drawn by the court are general, and present no legal question.

On the hearing, the Chancellor held the bill of sale void for fraud, and decreed its cancellation; also, that the $400 note should be cancelled; that the defendants should have a lien, in

the nature of a mortgage, for the money actually advanced to complainant on the slaves; and that the complainant might redeem the slaves on the payment of the amount due.

This decree is now assigned for error, together with other matters immaterial to an understanding of the points decided.

J. FALKNER, for plaintiffs in error, contended that the contract was void, because executed on Sunday (9 Porter 151; 5 Ala. 467; 9 *ib.* 198; Chitty on Contracts, p. 423; 5 Blackf. 111); that a void contract forms no cloud upon the title, and the party has his remedy at law (9 Ala. 198; 10 *ib.* 566); that if the contract is void, either at common law or by statute, it cannot be enforced by either party (5 Ala. 467; 10 *ib.* 811); and that the bill of sale was not a mortgage (7 Ala. 724; 14 *ib.* 281).

WHITE & PARSONS, *contra.*

GOLDTHWAITE, J.—It is unnecessary to consider the action of the Chancellor on the motion to suppress the deposition of Basil Adams, for the reason, that if his evidence is rejected, we all agree, upon a careful examination of the whole testimony, that the fraud of Isaac T. Smith is sufficiently established.

Neither do we consider the parties in this case as standing *in pari delicto.* The complainant is shown to have been upwards of seventy years of age,—infirm,—embarrassed,—his property levied upon, and about to be sold; and the defendant, Isaac T. Smith, was taking advantage of these circumstances, and of the position he occupied towards him as his son-in-law, to make the transaction have the appearance of an absolute sale instead of a mortgage. The party seeking relief was not only acting under circumstances of imposition and undue influence, but also of pecuniary pressure.—2 Story's Eq. (3 edit.) § 695 a, and cases there cited.

It is urged, however, on the part of the plaintiff in error, that as the transaction was executed on Sunday, the party, for that reason, has his remedy at law. It is true, that, if the nullity of the instrument appeared upon its face, a court of chancery might refuse to interfere, where no discovery was sought, or

defect of proof averred (Gray v. Matthias, 5 Ves. 286; Franco v. Bolton, 3 Ves. 368); but this is not the case here. The bill of sale is dated on Saturday; the specific relief required is such as a court of law cannot give, and the instrument, from its very nature, and its apparant validity, is calculated to throw doubt upon the title. It is well settled, that equity, under these circumstances, will maintain its jurisdiction, and afford relief, notwithstanding the instrument may be void in law.—St. John v. St. John, 11 Ves. 535; Simpson v. Lord Howden, 3 M. & C.; Bromley v. Holland, 7 Ves. 16; Hamilton v. Cummings, 1 Johns. Ch. 520; Elliot v. Piersol, 6 Pet. 95.

It follows that there was no error in the decision, which is affirmed; the plaintifis in error paying the costs of this court.

WALKER *vs.* PALMER.

1. Where the bill alleges a negative—that defendant, who was complainant's agent to sell, became himself the purchaser *without* complainant's consent—which the answer denies, and alleges the reverse affirmative to be true—that defendant became the purchaser *with* complainant's consent—the affirmative allegation of the answer is not responsive to the bill, but must be proved by defendant to make out his defence.
2. An agent to sell cannot himself become the purchaser without his principal's consent; if he is surety on his principal's notes for the purchase money, he has the right to secure himself, and the deed, which he had taken from his principal's vendor to himself, would give him a lien to the extent of the money which he paid; but if he had other moneys of his principal in his hands at the time of his purchase, his lien would be diminished to that extent.

Error to the Chancery Court of Benton.

Heard before the Hon. E. D. Townes.

This bill was filed by John B. Palmer against Joshua R. Walker. It alleges, substantially, that in 1842 defendant, as administrator of the estate of John Walker, who was the father of complainant's wife, received from her certain notes which had

been given to her as a part of her portion of her father's estate; that in 1845 complainant purchased a tract of land, situated in Benton County, from one Little, for about $350, and took from him a bond for title on the payment of the purchase money; that in December, 1845, said defendant, who resided in Benton, wrote to complainant, who then resided in Madison, requesting him to send said title bond to him (said defendant), saying that he had sold the land conditionally for $500, if complainant was willing to take that sum for it, and intimating that this was a good price; "that said bond for titles was accordingly placed in the hands of said defendant, to enable him to sell, or consummate a sale of, said tract of land for complainant; that said defendant obtained the possession of said bond for titles, and the control and management of said land, not by any purchase of either from complainant, but to enable him to effect a sale of the land, and to rent it out, and receive the rents annually until it was sold; that since complainant purchased said land, said defendant has rented it out for several years, and received the rents and profits, and has cultivated a portion of it himself; that the value of the rents and profits thus received by defendant amount to at least $350; that after said defendant thus obtained possession of said bond for titles, and the control of said land, he delivered up said title bond to said Little, without the knowledge or consent of complainant, and obtained from said Little a deed conveying the legal title to said lands to himself; that complainant never sold said title bond, nor made any transfer thereof to any person, and never authorized the execution of said deed to said defendant; that said defendant, since obtaining said deed, has instituted his action of trespass to try titles against complainant, as well as for damages by way of rent for said land, which action is pending and undetermined; that said Little has now no interest in said land, and that said defendant is asserting title thereto for himself, and in hostility to the rights of complainant." The prayer of the bill is, for an injunction of said action at law, "an account of the rents and profits, moneys and other things, which defendant has received on account of said land since the date of said bond for titles;" that, on final hearing, the legal title to said land be divested out of said defendant, and invested in complainant; and for general relief.

Walker's letter to complainant, dated December 26, 1845, is made an exhibit to the bill, and contains this extract: "I have sold your land conditionally for $500; and if you are satisfied, bring or send me the title bond, and, if the man comes, I will close the contract. The profit is something these times; there is more land to sell here. I want you to write me, as soon as you receive these lines, what you think of the sale of the land."

The defendant answered, alleging that he was surety for complainant on his notes to Little for the purchase money of the land; that he paid these notes, and took the title to himself, with the consent and approbation of the complainant; that he received rent for the land, on account of complainant, for the year 1846, but not afterwards; that he made the purchase for himself in the spring of 1847, and took Little's deed on the 25th of November, 1848; that complainant authorized him, in conversations had after the date of the letter of December, 1845, to sell as best he could, or take the land himself.

There is testimony showing that, in 1848, the land was worth from $600 to $800; that defendant rented out the land, during the years 1846, 1847 and 1848, as agent of complainant. But there is no evidence showing that defendant took the deed for the land in his own name with the consent and approbation of complainant.

The Chancellor decreed in favor of the complainant, enjoining the action at law, and directing the master to take and state an account between the parties; and this decree is now assigned for error.

Walker & Martin, and John Foster, for plaintiff in error:

As a general rule, an answer, when responsive to an allegation in the bill, must be disproved by two witnesses; and that this may require complainant to prove a negative does not relieve him from the operation of the rule.—2 Story's Eq. § 1528; 3 Ala. 478; Hogan v. Smith, 16 *ib.* 600; 14 *ib.* 370; 3 Paige 557; 1 Walker's R. (Michigan) 267. The case in 6 Ala. 618 is but an exception to the general rule, depending upon its peculiar circumstances, and has no application to the case at bar. If this rule is allowed to prevail, it must prove fatal to the complainant's case.

The statute of frauds has no application to a contract which has been executed, as in this case.—Andrews & Bro. v. Jones, 10 Ala. 421; Brown v. Bellows, 4 Pick. 179; Philbrook v. Belknap, 6 Verm. 383. Otherwise, that statute would be converted into an engine of fraud and oppression.—Brewer v. Brewer & Logan, 19 Ala. 481; Burt v. Henry, 10 *ib.* 874.

The land was purchased by complainant in September, 1845; he remained in possession but a few weeks, abandoned the land, and desired to abandon the contract, and did not return to the land until 1851. He cannot recover, because he does not bring into court, nor offer to repay to respondent, the money advanced by him: he who seeks equity, must do equity.—Story's Eq. Pl. § § 257, 258; Story's Eq. Jur. § 693.

Admitting that defendant, as complainant's agent, had received the amounts due the latter for rent as charged in the bill, still he would have had no right to appropriate them to the payment of the purchase money of the land, without the consent of his principal.—Cherry v. Belcher, 5 Stew. & P. 133; McBroom v. Governor, 6 Porter 32; 1 Ala. 121; 1 Stew. & P. 486.

This is not the case of an agent to sell merely becoming the purchaser for his own benefit. Complainant specifically authorized and requested the defendant to pay the purchase money and take the land, and this request was not recalled until long after it had been executed. The statements of the answer upon this point are directly responsive to the bill.—Caldwell v. Gillis, 2 Porter 526. To invalidate this, would amount to a denial to the parties of the right to contract for themselves.—14 Ala. 49. The weight of proof on this subject is in favor of the truth of the answer: complainant abandoned the idea of moving to the land in the fall of 1846; he solicited Little to do precisely the same thing that defendant afterwards did, in reference to taking the land; he authorized the defendant to sell the land on the same terms to any other person; he acquiesced in the purchase by defendant from the spring of 1847 to the spring of 1851, neither demanding rent, nor making any arrangement to pay the purchase money; all of which shows that he regarded the sale to defendant as valid and binding, and only sought to revoke it when extraneous circumstances had given an increased value to the land.

RICE & MORGAN, and WM. H. FORNEY, *contra* :

The admissions of Walker in his answer, and in his letter of December, 1845, and the evidence in the case, show that Walker was Palmer's agent to sell or rent the land. Aside from the fraud which vitiated Walker's purchase, and which clearly appears in the proof, the mere fact of his agency for Palmer forbade his taking the land on his own account.—Andrews & Bro. v. Jones, 10 Ala. R. 401; Same v. Same, *ib.* 461; Story on Agency, 200 to 205; 3 Munf. 232; 5 Dana 469; 5 Paige 650.

The fact that Walker was Palmer's surety on the notes given for the purchase money of the land, gives him no lien on the land.—Foster v. Atheneum, 3 Ala. 258.

The answer alleges, also, that Palmer consented that Walker should pay the purchase money, and take the title to himself; but in this respect the answer is not evidence. The allegation of the bill is negative: that Palmer did not consent that Walker should take the title to himself; while the answer alleges, affirmatively, that the arrangement was made with Palmer's consent. Such an answer does not throw the *onus probandi* on the complainant.—Carpenter v. Devon, 6 Ala. 718; Manning v. Manning, 8 Ala. 138; Dunn v. Dunn, *ib.* 784.

The testimony shows that, when Walker made the purchase for himself, and paid the purchase money, the land was worth from $600 to $800, and at that time Walker owed Palmer, for rents received, more than the sum he paid out for the land.

PHELAN, J.—The bill in this case alleges, that the title bond from Little was delivered to the defendant, Walker, as agent of the complainant, to enable him to make sale of the land; but expressly avers, that it was not transferred or sold to him; and further alleges, that the payment of the purchase money, by Walker to Little, and the making of the deed from the latter to the former, was not with the knowledge or consent of complainant.

Walker, in his answer, denies these allegations; and the answer goes on to aver, affirmatively, that the transaction was with Palmer's consent. There is no proof to this point, except what is furnished by the bill and answer; and this raises the question, whether such an answer is responsive to the bill, and proof, of itself, requiring two witnesses, or one with corrobora-

ting circumstances, to overcome its force. The averment of the bill is the averment of a negative, viz., that the taking of the deed to himself by Walker was without the consent of Palmer. If the answer had simply denied the truth of this negation, how would the case stand? Would it be incumbent on Palmer to prove, in order to make out his case, that he did *not* consent? To prove this description of negative averment, involves a moral impossibility, and is therefore not required, no matter from which party it comes. But, if Walker defends on the ground that Palmer *did* consent, that is readily susceptible of proof, and Walker must accordingly prove it. Palmer makes an averment which he is not bound to prove; but it was material to his case, and Walker was bound either to admit or deny it; and, if he denies it, to verify that denial in the only way in which such a denial can be verified, by proving directly and positively the existence of a fact or facts incompatible with its claim to truth. All this Walker cannot get over by simply averring, as if in response, that which he is bound on his part to prove, namely, that Palmer *did* consent. This was strictly a part of his defence—matter in avoidance, which he must prove. 2 Story's Eq. § 1529; 2 Phil. Ev. (C. & H.) 483 *et seq.*; 1 Stark. Ev. 377; 6 Ala. 718; 8 *ib.* 138 and 784.

The proof in the case, throwing out this affirmative allegation of the answer, goes clearly to show that Walker was only an agent for Palmer to make sale of this land; and the question now recurs, Could he take a valid deed to himself from Little, as against his principal, Palmer, under the circumstances of the case? An agent to make sale of property can no more sell such property to himself, than a man can sell his own property to himself; for, in respect to such property, the agent stands in the place of the principal: he can only buy, then, by contract with his principal.—Story on Agency, 210 *et seq.*

The proof here does not show, nor conduce to show, a contract between Palmer and Walker for the sale of this land. Walker's letter of December, 1845, says, in substance: "I have sold your land conditionally to another person, for $500; if you are satisfied with the price, send or bring me your title bond from Little," &c. The bond is sent pursuant to this request. This was no sale of the bond to Palmer, nor did it authorize him to take the land at the price named. Even if he had paid the

purchase money, and procured a deed to be made to himself in some short time after the date of his letter and the receipt of the bond, such a proceeding would have been without authority from Palmer, and would have conferred no valid title as against him; because Walker was made an agent to sell to another, and could not therefore buy himself.—Story, *supra*.

But the proof shows, that Walker rented out the land in 1846 and 1847, as the agent of Palmer, and in 1848 he takes a deed to himself from Little, without further correspondence with Palmer, so far as we are informed. By this time, too, the land had appreciated and was worth from $600 to $800. If he had sold the land to another in 1848, at the price of $500, he would have been guilty of fraud or negligence towards his principal, even if his sale had been valid as respects the purchaser; but, as between himself and his principal, the transaction cannot be supported, and he will be held to be a trustee of the legal title for the benefit of his principal.

The payment by Walker of the purchase money due to Little, on the ground that he was bound as a surety on the notes of Palmer, would give him no other right than to secure himself.—The deed, which he took in his own name, would give him a *lien* to the extent of the money he paid, and if he had moneys of his principal in hand at the time, derived from rent or any other source, his *lien* would be diminished to the extent of the money so held.

The decree below is in accordance with these views, and is affirmed; and the cause will be remanded, that it may go to the master to take and state an account.

TURNER ET AL. *vs.* COLE.

1. When no provision is made for the wife by her husband's will, she may claim the provision which the law makes for her, without dissenting from the will as prescribed by the act of 1812 (Clay's Digest 172 § 3).
2. Adultery on the part of the wife is no bar to her claim for a distributive share in her husband's estate under the act of 1812 (*Ib.* 173 § 4).

3. If the widow fails to present her claim for her distributive share of her deceased husband's estate to his personal representatives until after the estate has been finally settled by due course of law, her remedy against him and his sureties is gone, and she must follow the assets in the hands of the heir or distributee.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by Sophia Cole, the appellee, against John E. Turner and Hannah, his wife, Charles A. Deshon, Samuel Myers, J. C. Dubose and Henry Myers. It alleges, substantially, that the complainant was the lawful wife of John Cole, late of Mobile, deceased, having been married to him in England in 1816; that they there lived together as man and wife some twelve or fifteen years, when said John formed an illicit connection with said Hannah Turner, then Hannah Cottrell; that said John then deserted complainant, and, in company with said Hannah, came to Mobile, and there settled; that said Cole was a butcher by occupation, and in the course of time, while so living in Mobile, amassed a large fortune, consisting of real and personal property; that he departed this life in 1846, leaving a last will and testament, in which no provision whatever is made for complainant; that said Hannah, who, as complainant is informed, assumed the name of Hannah Cole, after complainant's desertion by her said husband, and pretended to be the lawful wife of said Cole, is made his principal legatee; that said Hannah, and defendants Charles Deshon and Samuel Myers, were appointed executors of said will; that the said Hannah and Deshon qualified as executor and executrix, with defendants Dubose and Henry Myers as their sureties on their official bond, and have taken possession of all the property, both real and personal, belonging to said estate; that complainant gave them notice, soon after her said husband's death, of her rights as his wife, and claimed as such whatever the law would allow her in said estate; that her claims were entirely disregarded by them, and that said Hannah has converted all the assets of said estate to her own use; that said Cole left few or no debts, and some trifling legacies to persons residing in England, all of which have

been paid; that a large estate was left, after the payment of said debts and legacies, which went into the hands of the said Hannah, who still retains the same; that the said Hannah and Deshon deny complainant's rights as widow and relict of said Cole, and said Hannah (who has since intermarried with said John E. Turner), claims to be his widow herself, and also claims the entire property devised to her by said will to the exclusion of complainant; that the personal property received by said executor and executrix amounted to $15,000; that, according to the statutes of this State, complainant's distributive share of her said husband's estate is one half of the personal property.

The prayer of the bill is, that said executors and their sureties be held liable to complainant for her distributive share of her said husband's estate; that they may be required to exhibit a true inventory and appraisement of the personal property of said estate; that an account may be taken of the same; and for general relief.

John E. Turner answers the bill, disclaiming all interest in the suit. Said Hannah Turner and Deshon file their separate answers, in which they set forth the condition of their testator's estate, showing that the personal property thereof amounts to about $5000: they profess ignorance of the fact of complainant's alleged marriage with said John Cole, and require proof of that fact; they admit that they have heard such a rumor, and allege that, if such is the fact, complainant eloped from the bed and board of said Cole, in 1828 or 1829, with one Dawty, with whom she lived in adultery several years until his death; admit that complainant and said Cole, at one time, lived together as man and wife, but require proof of their actual marriage; admit that a child was born during their co-habitation, and allege that it died in infancy. Said Hannah alleges that she was lawfully married to said Cole, or, at all events, believed herself to be lawfully married to him; that she did not know, at the time of her marriage with him, that complainant was his wife, if such was the fact; that complainant, by her adulterous intercourse with said Dawty and others since her elopement from said Cole, has forfeited all claim to any part of his estate: she admits the execution of said will by said Cole, that the

personal property of said estate is in her hands, and that she claims it as her own; denies having had any knowledge of complainant or her claims during the progress of the administration of said estate, but supposed her long since dead; denies that she has converted said property to her own use, and states that the whole of it, except one female slave and her four children, is now in her possession. Deshon's answer denies complainant's marriage with Cole, and admits all the allegations of the bill not contradicted as above stated.

The evidence establishes the following facts: That complainant and said Cole were married in 1816 or 1817, and lived together as man and wife for several years, during which time complainant gave birth to a female child, which died in infancy; that an illicit intercourse grew up, several years after their marriage, between said Cole and one Ann Partridge; that complainant and said Cole often quarreled on that subject; that complainant, in 1828 or 1829, eloped from her said husband's bed and board, with one Dawty, carrying with them all, or nearly all, of her husband's effects; that she lived in adultery with said Dawty until his death, and afterwards intermarried with one Williams; that she and said Williams lived together as man and wife for several years, and then separated, and there is no proof that said Williams is now dead; that she had two children by said Dawty while living in adultery with him; that said Hannah, about the time she was coming to this country with said Cole, was informed that he was married, but said Cole then called her his wife, or said that he intended to marry her; that said Cole and Hannah came to Mobile in 1833 as man and wife, and lived together as such from that time until his death, in 1846; that his estate was finally settled, after the lapse of eighteen months from the grant of letters testamentary, before the Orphans' Court of Mobile, without complainant's claim being presented to the executors; and there is no proof that either the executor or executrix knew of the existence of her claim.

The Chancellor decreed in favor of complainant, holding that she was entitled to one half of the personal estate of said Cole as his widow. To reverse this decree an appeal is

taken, and it is here assigned for error, first, that the Chancellor granted the relief sought by the bill; second, that the bill ought to have been dismissed; third, that the decree is erroneous, in granting any relief, and in decreeing to complainant any portion of the personal estate of said testator; fourth, that the court erred in decreeing against Deshon, and against the sureties on the bond of the executor and executrix.

E. S. Dargan and John J. Taylor, for appellants:

At common law, a husband could give away his whole personal estate, and thereby defeat the claim of his widow and next of kin.—2 Black. Com. 492; 1 Will. Ex. pp. 1 to 4. By our statute, the widow may dissent from the will, and claim her distributive share.—Toulmin's Digest, 258, 259; Clay's Digest, 172. But if she does not dissent within the time, and according to the mode, pointed out in the statute, she can claim nothing in opposition to the will.—8 Leigh 400, 409; 2 Dana 343; *ib.* 665; 7 Iredell 72; 6 *ib.* 273. The cases of Green v. Green, 7 Porter 19, McLeod and Wife v. McDonald and Wife, 6 Ala. 236, Hilliard v. Binford and Wife, 10 *ib.* 977, and Martin v. Martin, 22 Ala. 86, are not in conflict with this proposition; for, in each one of those cases, the application was for dower in real estate, which is a common-law right, independent of statute; but the distributive share of the personalty, in opposition to the will, is a right arising exclusively from the statute, and the complainant must show that she has done every thing that will entitle her to claim under the statute: her failure to dissent from the will, according to the statute, leaves her rights as they stood at common law, which would be cut off by her husband's will.

If it be considered that her claim to a share of the personal estate is part of the dower, then, we insist, complainant has forfeited it by her elopement and adultery. Adultery was made a forfeiture of dower by the act of Westminister 2, Edward I, which was passed long before the emigration of our ancestors from England, and therefore forms a part of our common law.—1 Kent's Com. 473; 5 Peters 223; 8 Pick. 314 to 317; 4 Paige 198; 4 Rawle 333; Parke on Dower, 223.

When an estate has been distributed by an executor accord-

ing to the will, without knowledge of a claim paramount to the title of the legatees, he cannot be held liable to such claim, but the party must pursue his rights against the legatees.—Sawyer v. Birchmore, 15 En. Ch. R. 392; David v. Frowd, 7 Con. En. Ch. R. 4. Admit that Mrs. Hannah Cole, when she married Cole in 1832, knew that complainant was his wife, and yet never heard of her from that time until the year 1850; and suppose that she had stated to the Orphans' Court that Cole had a wife, who abandoned him in 1827 and lived in adultery with another man, and that she had not been heard from since 1832 or 1833. The law, in such case, would have presumed her death.—1 Bouv. Law Dic. 418; 1 Phil Ev. 159; 24 Wend. 221; 4 Wharton's R. 173. The final settlement of the estate, therefore, relieves the executors from all accountability, and the complainant can go against Mrs. Turner only as having possession of the property. The act of 1843, which requires that the administrator shall state the names of all the distributees, cannot charge him, when he had no notice whatever of the existence of such person.

Percy Walker, *contra:*

1. Admitting adultery on the part of the defendant in error, she is nevertheless entitled to her distributive share of her husband's estate. Our statutes have not changed the common law on the subject of dower; and by the common law adultery on the part of the wife was no bar to dower; a divorce *a mensa et thoro*, at common law, did not bar dower. The common law was changed, in England, by the statute of Westminister 2; but this statute has never been adopted in this State, and it forms no part of our common law.—Fitzpatrick v. Edgar, 5 Ala. 499; 7 Sm. & Mar. 161; 16 S. & R. 13; 2 Binney 1; 1 Dall. (Penn.) 57; 4 *ib.* 168. But even if this statute was in force here, our statute of 1812 abrogates the rule contended for, and gives the distributive share without making it dependent on the wife's virtue.—1 Lomax's Dig. 109; 2 Brock. 256; 4 Comstock's R. 95. Distribution is regulated by the law of the domicil of the deceased.—2 S. & M. 617; 1 Mason 381; 2 Lomax on Ex., pp. 222, 223, and note.

2. As no provision was made for complainant by her husband's will, no dissent on her part was necessary to entitle her

to a distributive share of his estate. An examination of the statute of 1812 shows this to be the proper construction of it; and the construction is sustained by several decisions of this court, and of other courts upon similar statutes.—Green v. Green, 7 Porter 19; Hilliard and Wife v. Binford, 10 Ala. 977; Martin v. Martin, 22 Ala. 86; Craven v. Craven, 2 Dev. Eq. R. 338; Cummings v. Daniel and Wife, 9 Dana 361; 14 Vermont R. 120.

3. Complainant's claim, if upon the assets, is primarily chargeable against the portion of the residuary legatee, although she may have acted in good faith, and been ignorant of complainant's rights until asserted by the bill. The sureties of the executrix are in no better position to resist complainant's claim than the executrix herself. They undertook for her faithful administration; and her first duty was, to present complainant's interest. There is no reason why they should be treated with more indulgence in this case than in others; and if they could have been made liable at any time to complainant, that liability continues until barred by the statute of limitations.—6 Porter 393; 9 *ib.* 697; 21 Ala. 433. The sureties can claim no protection under the decree of the Orphans' Court, as that court had no power to discharge them.—Carroll v. Moore, 7 Ala. 615.

GIBBONS, J.—It must now be deemed the settled law of this court, that where no provision is made for the wife by the will of the husband, it is not necessary for her to dissent from the will, as prescribed by the act of 1812 (Clay's Digest 172 § 3), in order to avail herself of the provision which the law makes in her favor.—Green v. Green, 7 Porter 19; Martin's Heirs and Administrators v. Martin, 22 Ala. 86. The objection, therefore, that the complainant in the court below did not dissent from the will of the said John Cole, within the time prescribed by law, cannot avail the defendant as a bar to her rights. as no provision whatever was made for her in said will.

But it is insisted, that, although the complainant may not be barred by reason of her failure to dissent from the will of her husband within the time prescribed by law, yet, by her adultery after she eloped from her husband, she has forfeited her dower rights, and therefore cannot obtain the relief which

she seeks. In support of this position, it is insisted, that, although, by the common law, adultery did not operate a forfeiture of dower, yet, by the act of Westminister 2, Edward I, it was made to have that effect; and, inasmuch as that act was passed prior to the settlement of this country by our ancestors, it must be considered as part of the common law in this country; and therefore, regarding this statute as in force in this State as a part of the common law, the complainant is barred of all claims in the premises. In the view which we take of the case made by the record, we do not deem it important to decide whether the English act referred to is in force in this State, as a part of the common law, or not. The bill is filed, not for dower proper in the lands of the decedent, but for a distributive share of the personal estate of the said John Cole. We do not regard the claim set up as a common law claim, but one purely statutory—not of dower proper, but as heir to the deceased. We regard the second section of the act of 1812 (Clay's Digest 173 § 4), not as enlarging merely the dower rights of the wife, but as creating an heir to the husband's personal estate unknown to the common law. This statute we regard as making a species of forced heir in the wife as to the personal estate of the husband, which he can in no way defeat by his will or otherwise. This act, creating as it does an heir to the personal estate who takes absolutely what falls to her, has to be construed by itself, and is not to be considered dower, nor is it subject to any of the disabilities of dower; but, being the creation of a right unknown to the common law, purely statutory, it can only be subject to the disabilities created by the statute itself calling it into existence. In this view of the case, it becomes entirely immaterial whether adultery in this State operates a forfeiture of dower or not, as the demand set up by the bill is not one of dower, which is a common law right, but a demand as heir (a forced heir, if you will, of the deceased), which is a right purely statutory; and as the statute creating this right has not thought proper to make adultery a forfeiture of the right, we have no power to legislate ourselves upon the subject, and to create a disability where the statute is silent upon the subject. This view of the case is decisive, as to the complainant's right to recover on the case made by the record.

It is shown, however, that the estate of the said Cole was

finally settled in the Orphans' Court of Mobile County, before the presentation of the complainant's demand. The Chancellor disregarded this settlement, and held both the executors and their sureties liable to the complainant's demand. In this, we think, the court erred. There must be some time when the liability of executors and administrators and their sureties ceases, and we see no reason whatever for holding the one or the other liable longer than the final settlement of the estate according to law. This, in our opinion, is the extent of their contract. If a party having a claim against an estate, fails to present it until after the final settlement of the estate, it is his misfortune, so far as the representative and his sureties are concerned. His only remedy then is, to follow the assets in the hands of the heir or distributee. To hold otherwise, would be to hold that the liability of an executor or administrator and his sureties was unlimited as to time. To this proposition we cannot assent. The complainant's bill, therefore, should have been dismissed as to all the parties defendant except the said Hannah Turner and her husband, and as against them the decree should not have been in their representative capacity, but *de bonis propriis*.

The decree of the Chancellor is, therefore, reversed, and the cause remanded, with orders to let the bill stand dismissed as to all the parties except the said Turner and wife; that an account be taken as to the personal estate of the said John Cole, and that the one half of the said personal estate, after the payment of the debts of the said John, be decreed to the complainant, against the said Turner and wife, to be collected out of the property of the said Hannah. It is further ordered, that the complainant, or appellee, pay the costs of this court.

FRANKENHEIMER *vs.* SLOCUM & HENDERSON.

1. An ancillary attachment, sued out after the Code went into operation, in a suit commenced by ordinary process under the old law, is a part of the original suit, and must conform to the provisions of the old law.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. JOHN A. CUTHBERT.

THE appellant sued Slocum & Henderson in *assumpsit*, the writ being issued on the 11th of March, 1852. Afterwards, on the 24th of January, 1853, he sued out an ancillary attachment in the cause, which, on motion of the defendants, was quashed, because the affidavit was made before an officer (the circuit judge) who was not authorized by law to administer the same; and this judgment is now assigned for error.

R. C. TORREY, for appellant.

S. J. CUMMING, *contra*.

CHILTON, C. J.—The question presented by the record in this case is, whether, if an action be commenced by ordinary process before the Code went into operation, and an ancillary attachment be sued out afterwards, such latter proceeding should be governed by the Code, or should issue in conformity to the old law, which, it is admitted, must govern the principal action.

It is provided by the old law, that when such attachment, affidavit and bond shall be returned, they shall be filed with the papers in the original suit, and shall constitute a part thereof, and the plaintiff in said suit may proceed to judgment as in other cases, and the original suit shall not be delayed.—Clay's Digest, p. 63, § 34. The same section authorizes the judge of the Circuit Court to issue such attachments.

It is declared by section twelve of the Code, that "No action or proceeding commenced before the adoption of this

Code is affected by its provisions." In Mazange v. Slocum & Henderson, at the last term, 23 Ala. 668, we held, that actions and proceedings commenced before the Code took effect, are governed by the old law, as to all continuous proceedings had in the court in which they are pending; but that proceedings in the nature of a new action, although predicated upon the determination of the court had under the old law, if commenced after the Code went into operation, must conform to its provisions.

In our opinion, the ancillary or auxiliary attachment, authorized by the old law to be issued in certain cases, in aid of the suit then pending, must be regarded as a part of the original suit; for such is the language of the statute, and being part of it, is subject to the law which governs it. The concluding clause of the tenth section, which provides that "All acts of a public nature, designed to operate on all the people of the State, not embraced in this Code, are hereby repealed," must be taken with the exceptions and limitations provided in the Code itself; for, if the old law is not to govern as to actions commenced before the Code went into operation, and which remain unaffected by the new law as provided by the twelfth section, there would remain no law to govern them; which would be absurd.

The argument that this construction would require that the jury must be summoned and empannelled according to the old law, for the trial of actions pending before the Code went into operation, cannot be supported. This relates to the organization of the court for the public administration of justice generally, and cannot, with any propriety, be said to be a proceeding in any particular cause.

Let the judgment be reversed, and the cause remanded.

HAGADON *vs.* CAMPBELL.

1. Assignments of error founded on extraneous matter in the record, which does not pertain to the case between the appellant and appellee, will be stricken out.
2. When a defendant in a judgment at law is garnisheed as the debtor of the plaintiff, and pays the amount of the judgment to the attaching creditor, he may avail himself of the payment by a motion to enter satisfaction of the judgment against him.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. ROBERT DOUGHERTY.

HAGADON, having obtained a judgment in his own name against Campbell, in the Circuit Court of Montgomery, caused a writ of *fieri facias* to be issued thereon. At the return term of this writ, Campbell moved the court to enter satisfaction of the judgment on which it was issued, on the ground that Shipman & Gerding, who were judgment creditors of Hagadon for a much larger sum than Hagadon's judgment against him, had obtained a judgment against him at that term of the court, on a writ of garnishment, for the full amount of Hagadon's judgment against him, and that he had paid the money into court under this judgment. Hagadon resisted the motion, alleging that the debt against Campbell did not belong to him, but to Cleflen, Mellen & Co., his transferrees. The court granted the motion to enter satisfaction, except as to the costs, which, it appeared, had not been paid; and this judgment is now assigned for error, with other matters immaterial to an understanding of the opinion.

WILLIAMS & COCKE, for appellant.

WATTS, JUDGE & JACKSON, *contra.*

LIGON, J.—In the bill of exceptions and assignments of error, in this case, we find matters introduced which do not pertain to the case between the parties to the record. Hagadon and Campbell are the only parties; and yet the assignments of

error involve some matters to which Shipman & Gerding, and not Campbell, should have been brought in, as appellees; and others, to which Cleflen, Mellen & Co. would be the only proper parties appellant. Where foreign matter is thus introduced into the bill of exceptions, in the primary court, and errrors are assigned upon it in this court, such assignments will be stricken out.

Divested of all extraneous matter, the case made by the record presents but a single question: that is, Can a defendant in a judgment at law, in whose hands the sum due on such judgment has been condemned, on garnishment, in favor of the plaintiff, and who has paid the sum to the judgment on such garnishment, avail himself of such payment on a motion to enter satisfaction of the origininal judgment against him?

There is no doubt that he can; otherwise, the plaintiff would have the benefit of two satisfactions, the one made to himself, and the other to his creditor, and the defendant would thus be made to pay the money due twice.

Let the judgment be affirmed.

GARRETT ET AL. *vs.* HOLLOWAY & MALONE.

1. An endorsement of a note by one of the makers, purporting to transfer it, by written power of attorney, in the name of the payee, must be held to be the act of the payee himself.
2. When the sureties of a principal debtor are sued on a note, their principal is not a competent witness for them without a release.
3. A charge which is partly based on facts of which there is no evidence, is abstract.

ERROR to the Circuit Court of Cherokee.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by Holloway & Malone, as assignees of J. Renneau, against Edward Stiff, William H. Garrett, William Stallings, LaFayette M. Stiff, Jeremiah Murphy, Jesse Martin,

John L. Senter, and Wade Hampton, on a note for $150, dated 11th of April, 1850, and payable six months after date to J. Renneau or order. The suit was discontinued as to Edward Stiff and Jeremiah Murphy, who were not served with process. The pleas were, *non assumpsit*, want of consideration, failure of consideration, and usury.

On the trial, the plaintiffs offered the note in evidence, and the endorsement thereon, which was in these words: "By written power of attorney, dated April 12th, 1850, I transfer, in the name of J. Renneau, the within note to Messrs. Holloway & Malone, 30th July, 1850"; and was signed by Edward Stiff. The defendants objected to the endorsement as evidence, because it was not, in its legal effect, the endorsement of the payee of the note, and because plaintiffs had not shown, and did not offer to show, Stiff's authority to endorse for the payee; but the court overruled the objection, and allowed the endorsement to be read, and the defendants excepted.

The defendants then introduced one Turrentine as a witness, who testified, that said Edward Stiff had offered to negotiate a note to him, having, as he was informed, the names of some of the defendants to it, and for about the amount of the note offered in evidence, but he did not know that it was the same note, as he had never seen it before the trial; that said Malone, one of the plaintiffs, afterwards came to him, and inquired whether he knew anything of such a note, and how much he would give for it; witness replied, that he expected there would be some difficulty in the collection of the note, and that he would not give more than $20 for it; that Malone then stated that such a note had been offered to him, and that he believed he could get it just cut in two; that sometime after this witness understood from Holloway that Malone had bought the note, and that he (Holloway) was dissatisfied with it, but witness did not know what plaintiffs gave for the note. Another witness testified, that the note was made in his presence, and that he understood from some of the parties, at the time of its execution, that it was intended to enable Stiff to purchase some printing materials, or to be used for Stiff's benefit, and that the other defendants were his sureties; that he had heard of a man by the name of the payee, who lived in Georgia, and was a printer; that the payee was not present when the note was made, and that the

note was left in the possession of the witness for some time, and was afterwards delivered to said Edward Stiff.

The defendants then offered said Stiff as a witness, to which the plaintiffs objected. The court inquired for what purpose he was offered; which the defendants' counsel declined to state, but stated that said Stiff was a competent witness for some purposes; and thereupon the court sustained the objection, and excluded the witness; and the defendants excepted.

This being all the evidence in the cause, the defendants moved to exclude the endorsement from the jury, because no proof had been introduced of Stiff's authority to make the endorsement; but the court overruled the motion, and the defendants excepted.

The defendants asked the court to charge the jury, that, if they believed from the evidence that defendants were sureties on the note, and that it was made to be used in the purchase of printing materials from the payee, and that it was not so used, but was traded to plaintiffs, who had notice of the way in which it was intended to be used, then plaintiffs could not recover; which charge the court refused to give, and the defendants excepted.

The defendants then asked the court to charge, that, if the jury believed from the evidence that defendants were sureties on the note, and that no consideration passed from the payee, and that plaintiffs got it at one half of its nominal value, then they could only recover that amount with interest. This charge the court gave; but added, that, if there was no evidence of what plaintiffs gave for the note but the testimony of the witness Turrentine, that alone was not sufficient evidence that plaintiffs gave only one half of the nominal amount of the note,—that they must look to all the proof on that subject, and must find for the whole amount with interest, unless they were satisfied from all the proof that the note was negotiated for one half, or for some amount less than its nominal value; to which qualification of the charge the defendants excepted.

All the rulings of the court above set forth, to which exceptions were saved, are now assigned for error.

S. F. Rice and J. J. Woodward, for plaintiffs in error.

Walker & Martin, *contra*.

GOLDTHWAITE, J.—The note sued on was payable to J. Renneau, or order, and the endorsement was in these words: 'By written power of attorney, dated 12th of April, 1850, I, transfer, in the name of J. Renneau, the within note to Messrs. Holloway & Malone, 30th July, 1850.

(Signed.) EDWARD STIFF."

The recital in the endorsement is, in substance, that the transfer was made in the name of the payee, and by his attorney, and is sufficient to show clearly that it was intended as the act of the principal (Grubbs v. Wiley, 9 S. & M. 29); and when that is the case, it must be held as his act, especially when it is not required to be done under seal.—City of Detroit v. Jackson, 1 Doug. Mich. Rep. 106.

There was no error in rejecting the witness, Stiff, under the circumstances. He was the principal in the note, and was offered by the defendants, who were his sureties, without offering to release him.—Richards v. Griffin, 5 Ala. 196; Bondurant v. The State Bank, 7 *ib.* 830.

In relation to the first charge requested, the court committed no error in refusing it. But one witness appears from the record to have testified anything in relation to the consideration; and he states, that he understood from some of the parties, at the time of its execution, that it was made to enable the principal, Stiff, to purchase some printing materials, or to be used for his benefit; and there is no evidence whatever that tended to bring home knowledge of the consideration to the plaintiffs below. The charge, as requested, being based in part upon facts of which there was no evidence, was abstract.

The second charge might properly have been refused for the same reason. The opinion or belief of the plaintiff, that he should be able to obtain the note at one half, was no evidence that he paid but that amount for it; and in the absence of testimony tending to establish that fact, the charge was abstract.

We see no error in the record, and the judgment is affirmed.

COTHRAN *vs.* LEE.

1. The husband is liable for necessary medical attendance on his wife, although the physician was called in against his objection, by his grown son, who lived with him, and who promised him to assume the payment; it being shown that the husband was present while the physician was rendering his services, and that the latter had no notice whatever that he was not to look to the husband for payment.

ERROR to the Circuit Court of Cherokee.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by Lee against Cothran for medical services rendered defendant's wife. The facts of the case appear in the opinion.

J. J. WOODWARD, for plaintiff in error.

MORGAN & WALKER, *contra.*

PHELAN, J.—In this case the proof shows, that a son of Cothran, of full age, who lived with his father, at the request of his mother, who was sick, but against the objection of his father, called in Lee, the defendant in error, who was a practicing physician, to attend on his mother. The father, when the son spoke of calling in Dr. Lee, told him, if he did so, he must do it on his own responsibility, to which the son assented. The doctor was called in by the son, to attend on his mother. The father was present generally during his attendance upon his wife, and did not give any notice that the son had called him in on his own responsibility, or that he should object to paying him for his services to his wife; neither did the son ever give notice that he had called the doctor in on his own responsibility.—There was no controversy in regard to the value of the services. The only question raised was, whether, under the foregoing state of facts, the husband was responsible for the medical attention bestowed upon his wife. The court below charged that he was, and this is assigned for error.

The husband is responsible for necessaries, suitable to her

degree and condition, which are furnished to his wife. He may restrict her from making purchases of certain persons, if he gives notice, and makes suitable provision elsewhere. Medical attendance on the wife in sickness is a necessary.

If the elder Cothran was not willing to have the services of Dr. Lee as physician to his wife, he was bound to give notice to that effect. It seems that he objected to his son, and the son, at the instance of the mother, called in this physician on his own account; but the physician knew nothing of these things. He rendered his services in the presence of the husband, and heard no objection; this gave him the right to infer that he had been called in by the approbation of the head of the family—the husband and father. Had it been intimated to him that he must look to the son for his pay, he might not have been willing to have rendered the services on such a condition. If a wife, in company with her husband and a grown up son, should go into a store, and make purchases for herself, suitable to her degree and condition, no one would ever expect the merchant to charge the goods to any one but her husband; and in such a case, the husband would unquestionably be liable, even if the son had agreed, before they went in, that he would pay for the goods, if no intimation of this was given to the merchant at the time. This case is not distinguishable, in principle, from the case just put. In both cases, the law makes the silence of the husband equivalent to an acknowledgment of his liability for the goods sold and the services rendered to the wife.

Let the judgment be affirmed.

MAURY *vs.* COLEMAN.

1. When a person who is about to purchase a note given for the hire of a slave, applies to the maker for information concerning it, and is assured by the latter that he has no defence against it, this does not preclude the maker, when sued by the purchaser, from setting up a subsequent failure of consideration, arising out of the payee's conduct in receiving the slave, who

ran away before the expiration of the term of hiring, and refusing to deliver him up on demand.

ERROR to the Circuit Court of Sumter.

Tried before the Hon. B. W. HUNTINGTON.

ASSUMPSIT by Coleman against Maury, on an instrument in writing of which the following is a copy:

"$135. On the first of January, 1852, we, or either of us, promise to pay L. D. Phillips one hundred and thirty-five dollars, for the hire of a negro man named April, and to furnish said negro with the usual clothing.

Dec. 30, 1850. (Signed) T. F. MAURY.
J. T. HILL."

No pleas appear in the record. The bill of exceptions is as follows:

"The plaintiff offered the above note in evidence, and also the endorsement of the payee. There was no evidence that the plaintiff had given any consideration for the note, except as hereinafter stated. The plaintiff proved that, not long after the date of the note, he called on defendant, and said to him either that he had traded, or was about to trade for the note (which it was witness could not remember), and asked defendant if he had any set-off to it; to which defendant replied, that he had no set-off, and that the note was all right. The note was proved to have been given for the hire of the slave mentioned in it for the year 185 –. The evidence tended to show that Maury treated the slave humanely, but that, about September of the year of hiring, he ran away, and went to his master, the payee, who lived about two miles from Maury; that Maury went to a neighbor (on finding the slave gone), procured dogs accustomed to trailing negroes, and by means of the dogs, and in company with their owner, trailed the slave to his master's house; that on the arrival of Maury on the street before the house of Phillips, the owner of said slave, he, Phillips, came out, and Maury demanded the slave, being free from excitement, and telling Phillips that the slave should go into no one's hands but his own, and should not be treated harshly; but Phillips refused to deliver the slave, and after some conversation they parted. The plaintiff also proved, that the next day Maury and Phillips met in a store in Livingston, when

Maury said to Phillips, if he would surrender to him the slave, and pay for the time he had kept him from his possession, he would take him; to which Phillips replied, that he had tendered him the slave about an hour after their first interview, when he (Maury) had told him, that, as he could not get the slave when he wanted him, he would not take him, and that he (Phillips) had since hired him out to another for the remainder of the year; which statement of Phillips (about the tender about an hour after the first interview) Maury did not deny.

"Whereupon, the court charged the jury, that, if the plaintiff applied to the defendant in reference to the note, either before or after its purchase by the plaintiff, and the defendant then informed the plaintiff that it was all right, or that he had no set-off against it, the defendant could not defend against this note, in the hands of the plaintiff, by showing that, after the time of the endorsement, and after the conversation referred to, the negro had run away and come into the possession of the payee, who refused to return him on demand.

"The defendant requested the court to charge the jury, that he had a right from the contract of hiring—a right inherent in the contract, and patent on the face of the note, that he should have the services of the slave for the period of hiring, without molestation by Phillips; that Coleman took the note subject to this right, and that, if the jury believed that after the plaintiff obtained the note Phillips improperly received the slave and prevented the defendant from having him for the remainder of the hiring, by refusing to deliver him, then the plaintiff could not recover, even though the defendant had, before the wrong of Phillips, told the plaintiff that he had no set-off, and that the note was all right. This charge the court refused to give, and the defendant excepted, as well to the charge of the court as given to the jury, as to the refusal of the court to charge as prayed;" and he here assigns the same for error.

R. H. Smith, for plaintiff in error, cited the case of Clements v. Loggins, 1 Ala. 622, and 2 *ib.* 514.

GIBBONS, J.—The principles governing the questions presented in the present record, were, in our opinion, substantially settled in the case of Clements v. Loggins, 2 Ala. 514. In

that case, Loggins had purchased of one Cooper certain lands, for which he executed his certain promissory notes, and received a bond for titles, to be made on the payment of the purchase money. The notes given out were four in number; one for one hundred dollars, payable 1st March, 1837; and three for two hundred dollars each, payable to the said Cooper, and falling due the 25th day of December, 1837, 1838, and 1839. The first note was paid at maturity. In the summer of 1838, the plaintiff, Clements, gave the defendant, Loggins, notice that he had purchased the three notes last falling due, and inquired if he had any defence against them, or either of them. To which defendant replied, that he had none, except a set-off of about one hundred dollars, and that he had said the same thing to the plaintiff a few days before, when he was inquiring of him about the notes for the purpose of purchasing them. This conversation was after another conversation, held with the said Cooper, in which he had promised to pay all the notes on his return from Mississippi, and the said Cooper then ageeed, on his doing so, to make him a title. Some time in December, 1838, the defendant offered to pay Cooper the amount due on the land, and demanded title. Cooper admitted that he could not make title; that he had never had title in himself; that the notes for the purchase money belonged to the plaintiff, and that, if he would pay him, he would endeavor to make title. Defendant then told Cooper, he would have nothing more to do with the land. It further appeared, that the title of Cooper was a bond for title of one Collins, from whom he had purchased, and that the purchase money was unpaid to Collins; Collins had obtained judgment for the purchase money, and could make nothing out of Cooper on execution, because he was insolvent. On this proof, the court says: "The maker of a note, when applied to by one intending to purchase it, to know if there is any defence against it, by admitting that he has none, thereby precludes himself from afterwards setting up any defence, when sued on the note, which existed at that time within his knowledge, as it would be a fraud on the intended purchaser. But, we think, he would not be precluded from making a defence which might subsequently arise out of the original contract; such, for example, as a total failure of consideration;" citing Buckner v. Stublefield *et al.*, 1 Wash. R. 386; Hoames v.

Smock, *ib.* 390. "As already remarked, to permit the maker to avail himself of any defence which existed at the time of the application to him for information, would be to countenance a deceit; but, if the note be purchased on the faith of a promise by the maker to pay it, he will be compelled to pay the assignee at all events, on the ground of a contract, of which the purchase of the note would be a sufficient consideration. So, in this case, if the contract was rescinded after the plaintiff acquired title to the notes, from the inability of the vendor to make title, the defendant being ignorant at the time he was applied to by the plaintiff for information respecting the notes of the inability of the vendor to make title, the failure of the consideration would be a valid defence against the notes in the hands of the plaintiff."

We have but to apply the principle here decided to the case at bar, to show that the court erred in its charge to the jury. The doctrine of the charge, as given to the jury, was, that after the plaintiff had bought the note, and after the defendant had said to the plaintiff that the note was all right, and he had no off-set to it, nothing that could subsequently transpire as between the original parties to the note could create a valid defence to the defendant as against the plaintiff. This is the precise question decided in the case cited from 2 Ala. There the rescission of the contract for the sale of land did not take place until long after the plaintiff had acquired the notes, and after a conversation very similar to that which took place between the plaintiff and defendant in the case at bar; and yet the court decided, that the defence could be made, if the defendant had acted fairly and honestly in his replies, which he had given on being applied to by the plaintiff for information in regard to the notes when about to purchase them.

The charge asked by the defendant, in our opinion, asserted a correct proposition of law, and should have been given.

Let the judgment of the court below be reversed, and the cause remanded.

MANNING *vs.* MANNING.

1. The act of 1848, "securing to married women their separate estates," has no retro-active effect to defeat the marital rights which had vested in the husband prior to its passage; and where he had reduced to his possession as husband, before the passage of that act, his wife's interest in certain slaves, their subsequent sale by order of the Chancery Court, for the purpose of distribution, would not have the effect of divesting his rights and turning the money into a chose in action.
2. Husband and wife being entitled to certain funds in the Chancery Court (the separate property of the wife, which the husband was entitled to hold as her trustee without accounting), the wife filed her petition in said court, alleging her husband's incapacity and unfitness to act as her trustee, and praying that another trustee might be appointed to take charge of the fund; the evidence showed that she had abandoned him without sufficient cause, and removed beyond the jurisdiction of the court with another man, while it failed to establish the husband's alleged incapacity and unfitness: The petition was dismissed, at the costs of the next friend of the petitioner.

APPEAL from the Chancery Court of Lowndes.
Heard before the Hon. J. W. LESESNE.

A bill was filed in the Chancery Court of Lowndes for the partition of certain slaves among the children of John M. Mock, in which partition had been decreed, and a sale of the slaves ordered. After the sale, and while the money was in the hands of the register, Emily Manning, who was one of the children of said Mock, filed her petition in said court against her husband, Moses T. Manning, in which she alleged that she was entitled to her share of said fund in her own right, "being one of the children of said Mock named and provided for in said deed under and by virtue of which said decree of partition and distribution was rendered"; that she was married to her said husband on the 23rd of December, 1847, and continued to live with him until August, 1848, when she returned to her father's house, in consequence of his adultery and other misconduct. In addition to the charge of adultery on the part of the husband, the petition alleges his intemperance, profligacy and utter unfitness to act as her trustee; and asks that said fund be settled upon petitioner

for her sole and separate use and support, and that another trustee may be appointed to take charge of it.

The husband answered the petition, denying the alleged misconduct on his part; alleging that his said wife had abandoned him without just cause, and eloped with one Benjamin Kelly, with whom she was now living in adultery in Texas; and claiming that, "under the provisions of the act of 1849–50, he is entitled to have and receive said sum of money, now in the hands of the register, as the trustee of his wife." The answer also contains a demurrer to the petition.

It is unnecessary to state the evidence, as no question of law arises upon it. The Chancellor rendered a decree in favor of the petitioner, and his decree is now assigned for error.

I. B. Stone assigned errors for the appellant; and Watts, Judge & Jackson filed a written argument for the appellee.

CHILTON, C. J.—The Chancellor, in his decree, appears to have overlooked the demurrer in the answer to the petition. It is certainly defective, in failing to show that the property which was ordered to be sold, and on account of the sale of which the money, sought to be obtained and settled to the sole and separate use of the wife, accrued, had not, before the sale, been reduced to the husband's possession.

If the husband's marital rights had attached,—in other words, if he had reduced the slaves into possession as husband, the subsequent sale by order of the Chancery Court, for the purpose of a more equitable distribution, by which the proceeds would be substituted for the property sold, would not have the effect of divesting his right and turning the money into a chose in action. The petition avers that the marriage between the petitioner and her husband, Moses T. Manning, took place in December, 1847, before the passage of the act "securing to married women their separate estates," &c.; and whatever right to the property had vested in the husband, in virtue of his marriage, before the passage of said act, namely, the 1st of March, 1848, remained unaffected by that act, since it has not any retro-active effect to destroy vested rights.

But the nature of the tenure by which the property was held, is not set forth in the pleadings, nor any right asserted by

the answer as having accrued to the husband in virtue of his possession; and inasmuch as the defendant submits to hold the money, and actually bases his right to it on the act of 13th of February, 1850, making him trustee of his said wife of the property which accrues to her, we shall proceed to consider the case in this latter aspect.

The petition proceeds on the ground, that the wife has been compelled by the husband's misconduct to abandon him—that he is an improvident and intemperate man, unfit to manage this fund as trustee.

The defendant denies that he mistreated his wife as charged, and insists that she has abandoned him without his fault, and is now living in adultery with one Benjamin Kelly; also denies the charges as to his unfitness to act as trustee. The proof, while it shows some obscene and disgusting conduct on the part of the defendant below, fails altogether to make good the allegations of the husband's intemperance, or unfitness, from any cause, to take charge of the funds; while, on the other hand, it very clearly shows that petitioner has gone off to Texas with said Kelly. The case then amounts to this: A husband and wife being entitled, in right of the wife, to certain funds in the Chancery Court, which is the separate property of the wife, but which the husband, as trustee, is entitled to hold, without being required to account, the wife, without sufficient cause, abandons the husband, and removes with another man beyond the jurisdiction of the court, and now applies for the fund as a means of providing her a maintenance, and seeks to have the husband excluded as trustee and another appointed.

The only reason assigned by the Chancellor, for refusing to permit the husband to occupy the relation of trustee to the fund, is, because of the situation of the parties, living, as they are, separately, under the circumstances shown by the record. He concedes that the proof may well be disregarded, as establishing nothing material in the cause. But we are of opinion, the relative situation of the parties furnishes a strong reason for the court's refusing to be active in taking the fund from the husband. This is not the case of a wife asserting her equity, to obtain a settlement out of her estate, which the husband is endeavoring to recover, and which, when recovered, would belong to him; for both the parties concede that the *corpus* of the fund

belongs to the wife, as her separate estate under the statutes of this State, and will not be changed when it goes into the husband's hands, so far as the wife's right to it is concerned. But it is an application merely to oust the husband as trustee, and to appoint another,—to provide a maintenance for the wife out of the profits, she having abandoned her husband, where a maintenance was afforded her, and gone off with another. Her wrongful abandonment of her husband furnishes no reason why the court should deprive him of the right which the statute confers upon him. It must not be supposed, that the objects of the statutes of March, 1848, and February, 1850, securing to married women separate estates, was to render them independent of their husbands, and to enable them, in violation of all the duties they assume by entering into the marriage state, to abandon their husbands at pleasure, and throw themselves upon such property for a support; for, by the terms of the third section of the act last referred to, the property so secured shall "vest in the husband as trustee of the wife; and the husband shall be authorized, so long as he shall continue such trustee, under the provisions of the act, to have, possess, control and manage all such separate estate, without liability to account to the wife, her heirs, executors or assigns, for the rents, proceeds and profits thereof." Here then is a right conferred on the husband, a valuable, beneficial right, of which he is not to be deprived, unless he forfeits it in some way by his misconduct, or inability to discharge the duties springing out of it. The record in this case fails to show that he has done, or omitted to do, anything which should work such forfeiture.

The wife having rejected the support which was furnished at the home of her husband, and having abandoned him without sufficient cause, must take the consequences of her imprudence. She cannot set up her own wrong as a reason for depriving her husband of a right clearly conferred by the statute.

The decree of the Chancellor must consequently be reversed, and a decree here rendered dismissing the petition.

Let the appellant recover of the next friend of the appellee the costs of this court and of the court below.

BRANTLY *vs.* SWIFT.

1. A practical surveyor, who testifies that he is familiar with the peculiar marks used by the United States' surveyors in their government surveys, may give his opinion, as an expert, whether a particular line was marked by them.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

TRESPASS TO TRY TITLES by Wylie Swift against John Brantly. On the trial, as appears from the bill of exceptions, the plaintiff introduced one Sample as a witness, who was the county surveyor of Dallas, and who testified, "that he discovered on the disputed boundary three lines marked on the trees several feet apart, and from forty to fifty feet from a direct line run from one corner to the other of the sections, as that line was run by the witness; neither of these three lines, as marked, extended the whole width of the section, but were seen only for about a quarter or a third of a mile, and neither of them, when run through, came out at the corner as ascertained by the filed notes of the government surveyors, or nearer to it than the width of the avenue containing the lands in dispute. Witness further stated, that he had no knowledge as to the manner, or by whom, or when these lines were run and marked. The plaintiff then asked the witness, if he was acquainted with the manner in which the United States' surveyors marked the lines run by them? He answered that he was, he had seen their marks often, and was familiar with them; that their marks were peculiar, and made with a hatchet framed for the purpose, and that no other surveyors marked lines in that way. The plaintiff then inquired, whether, from his knowledge of the manner in which the United States' surveyors usually marked lines, he believed one of the marked lines above referred to was a line run and marked by the surveyors of the United States in surveying the lands. To this question the defendant objected; but his objection was overruled by the court, and he excepted.

This exception is all that appears to have been taken in the

court below, and the ruling of the court in respect to it is here assigned for error.

J. W. LAPSLEY, for appellant.

WM. M. MURPHY, *contra.*

LIGON, J.—The only question in this case relates to the ruling of the court in reference to the question put to the witness Sample, which was objected to by the defendant. The record shows, that the witness was a practical surveyor; that he had often traced the lines marked by the United States' surveyors, and was familiar with their marks, which were peculiar, differing from the marks or chops made by other surveyors. Here is a sufficient predicate to allow the witness, as an expert, to give an opinion, or express his belief, as to whether the line spoken of was marked by the United States' surveyors. On questions of science, persons of skill may not only speak as to facts, but are allowed to give their opinions in evidence.—1 Phil. Ev. 290. Whether the witness who is allowed to give his opinion in evidence, is an expert, and skilled in the matter about which his opinion is desired, is a question for the court.—2 Phil. Ev. (C. & H.'s Notes) 761.

There is no error in the record, and the judgment is affirmed.

NOLEN *vs.* PALMER.

1. The acts of Congress of 1805 and 1820, "concerning the mode of surveying the public lands of the United States," do not establish the corners of subdivisions of fractional sections, as fixed by the United States' surveyors, in the government surveys, as the true corners; but the corners of quarter sections are to be placed equi-distant from the section corners on the same line. (Adhering to the decision in Walters v. Commons, 2 Porter 38.)

ERROR to the Circuit Court of Barbour.

Tried before the Hon. ROBERT DOUGHERTY.

TRESPASS TO TRY TITLES by Avery Nolen against Benjamin Palmer, "to recover possession of the east half of the north-east quarter of fractional section 26, in township 10, range 27, lying in Barbour, and subject to entry at the Land Office in Montgomery; to try the titles thereto, and recover damages for the detention thereof, and particularly to try the titles to the south end of said tract, now in possession of, and under cultivation by the defendant, and also damages for the detention thereof."

It appears from the bill of exceptions, that the parties claimed adjacent tracts of land in the same fractional section, under patents from the United States, both of which were issued on the same day; and the only question between them was, where the division line ran. "The plaintiff's evidence conduced to prove, that the eastern boundary line of said fractional section was returned to the General Land Office, by the original official government surveyor, in his original and only return, as being 94 chains and 40 links in length, when in fact, as the county surveyor testified, it is 101 chains and 50 links long; that plaintiff's lands were returned and represented, in said original return, as containing 74 acres, whereas, in fact, as said county surveyor testified, they contain 80¼ acres; that defendant's lands were returned and represented, in said original return, as containing only 92 acres, whereas, in fact, as said county surveyor testified, they contain 100¾ acres; thus showing an aggregate gain by said lands, over the amount returned to the General Land Office, of 15 acres, which, as plaintiff contends, should be divided between him and defendant in proportion to said amounts owned by them respectively."

"It was in evidence that the half-mile stake, placed by said original surveyor at the point to which defendant claims, and called in his field notes a quarter section corner, is, according to plaintiff's evidence, short of a half mile from the section corner of said fractional section, and that the true half-mile point from said section corner is several chains further south, at the point to which plaintiff claims; and that, if plaintiff's lands extend to said true half-mile stake, then defendant has, and before suit had, in cultivation, claiming as his own, over *two* acres of land claimed in this action by plaintiff; that if said overplus or gain was divided between plaintiff and defendant,

then the amount of plaintiff's land, so claimed and cultivated by defendant, is $5\frac{3}{4}$ acres; but, if the quarter section corner, as placed by said original surveyor, be the true point of division between plaintiff's and defendant's lands, then no trespass has been committed."

The court charged the jury, that, this being a fractional section, said half-mile stake, or quarter section corner, as placed by said original surveyor, was the true point of division between plaintiff and defendant in respect to their said lands; and this charge is now assigned for error.

J. Buford and S. F. Rice, for plaintiff in error, contended, that the half-mile stakes are not fixed by law, as in the case of section corners, and if the surveyor made a mistake in placing them, they may be moved; citing Walters v. Commons, 2 Porter 38, which was recognized as the law of this case in 21 Ala. 70.

P. T. Sayre, *contra*, insisted, that, the land in controversy being a fractional section, must be governed by the laws applicable to fractional sections, which establish the length of the lines as actually fixed by the government surveyors; citing Lewen v. Smith, 7 Porter 428.

GOLDTHWAITE, J.—The patent of the plaintiff, Nolen, called for the east half of the north-east quarter of fractional section 26, township 10, and range 27, containing seventy-four acres, according to the plat of the official survey returned by the Surveyor General to the Land Office. The eastern line of this section, running north and south, was more than a mile in length, and the half-mile stake, or quarter section corner, as fixed by the United States surveyor, was less than a half mile from the north-eastern corner of the section. The questions presented by the record, are, whether the eastern line of the plaintiff's lands runs below the corner thus fixed by the Surveyor General? and, if so, how far?

The act of Congress of 24th April, 1820, (3 Stat. at Large 366) provides, that in "case of the division of a quarter section, the line for the division thereof shall run north and south, and that the corners and contents of half quarter sections, which may hereafter be sold, shall be ascertained in the manner, and

on the principles, directed and prescribed by the second section of an act, entitled, "an act concerning the mode of surveying the public lands of the United States," passed the 11th February, 1805; and fractional sections, containing one hundred and sixty acres, and upwards, shall, in like manner, as nearly as practicable, be subdivided into half quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Treasury." These regulations, which may be regarded as part of the law, authorized the subdivisions of fractional sections, into half quarter sections, by lines running east and west, as well as north and south.—Circular Letter of Secretary of Treasury to the Surveyor General of 10th June, 1820; 2 Porter's Public Land Laws, &c., 820.

The corners and contents, therefore, of the east half of the north east corner of fractional section 26, belonging to the plaintiff, must be ascertained upon the principles of the second section of the act of Congress of 11th February, 1805.—2 Stat. at Large, 313.

The construction of this section of the act referred to, was settled by the decision of this court in Walters v. Commons, 2 Porter 38, where the question was directly presented, as to whether the corners of subdivisions of sections, established incorrectly by the United States' surveyor, could be corrected by removing the half-mile stakes. The court held, that the corners of subdivisions of sections were not declared to be established "as the proper corners," as was the case with the section corners, but that the corners of such subdivisions were to be placed "as nearly equi-distant as possible from the corners of the section;" and if a mistake was made in that particular, by the United States' surveyor, the mistake could be corrected. We are free to confess, that this construction appears to us to be directly in the teeth of the act, which, in our opinion, as clearly establishes the corners of subdivisions of sections, when fixed by the surveyor of the United States, as the true corners of such subdivisions, as of the sections; but, as the decision is in relation to the boundaries of lands, we do not feel at liberty to overrule it, according to the principles laid down by this court in the case of Rawles v. Kennedy, 23 Ala. 240.

It is insisted by the defendant in error, that the case of Lewen v. Smith, 7 Porter 428, is in conflict with Walters v. Commons,

supra; and it is undeniable, that the reasoning of the judge who delivered the opinion in the first case referred to, would lead to the adoption of a different principle from that established in Walters v. Commons; but the point was not presented in Lewen v. Smith. The question there was, whether a fractional section line—not the subdivision of the fraction—as actually run by the United States' surveyor, was the true line, and whether the corner of the section, as fixed by that officer, was the true corner. The case of Commons v. Walters, holds, that the section lines and corners thus established cannot be changed, and the decisions in the two cases are entirely consistent with each other.

We are forced, therefore, under the influence of the first case, to hold that the quarter section corner on the eastern line of the section must be fixed equi-distant from the section corners on the same line; and a line run from that corner, thus ascertained, west to the half quarter section running north and south, would be the southern boundary of the plaintiff's line under the patent.

The charge of the court not being in accordance with these views, the judgment is reversed, and the cause remanded.

RICHARDSON'S ADMR'S *vs.* RICHARDSON ET AL.

1. A testator appointed his widow guardian of his minor children and executrix of his will, and directed the share of each child to be paid on its arriving at full age; a division of the estate was afterwards had between the widow and children, by persons duly appointed by the Orphans' Court, but no settlement was made with the court; after the widow's death, her administrators were cited, by one of the testator's legatees, to settle her executorship, and also, by one of her distributees, to settle their administration on her estate; after due notice, all the parties in interest appeared, and "it was agreed that both estates should be blended and considered as one, as the parties in interest to both were precisely the same;" and a settlement was made, and a decree rendered accordingly: *Held*, on error assigned by the administrators, that the decree was erroneous, because the two estates could not be thus consolidated by the Probate Court.

ERROR to the Court of Probate of Shelby.

THE error assigned is, the decree of the Court of Probate on the final settlement of the estates of Charles Richardson and Mary Richardson; the administrators of said Mary Richardson being plaintiffs in error. The facts of the case are detailed in the opinion.

WHITE & PARSONS, for plaintiffs in error, contended, that the decree was erroneous, because the settlement of the two estates could not be consolidated, as no execution could issue on such a decree against the sureties on either bond.

F. BUGBEE, *contra*, contended, that plaintiffs in error could not be heard to object to the decree, as it was made by their consent; and that they could not raise the objection that the minors could not consent, as the latter did not assign error for themselves, nor complain of the decree.

PHELAN, J.—From the record it appears, that Charles Richardson died in Shelby County, in 1842, leaving a will, and appointing his wife, Mary Richardson, and another, executor and executrix.

Mary Richardson became sole executrix, and gave bond. In December, 1842, a division of the estate of Charles Richardson was made between his widow and children, ten in number, several of whom were minors, by persons duly appointed by the Orphans' Court, agreeably to the will; but no settlement of the estate was ever made with the court. The executors were made by the will guardians of the minor children, and they were directed to keep the estate together, after paying off to the adults their shares; being required to pay to the minors their shares respectively as they become of age; all the shares to be equal.

Mary Richardson died in 1849, and George M. Randall and Noah T. Richardson were appointed administrators of her estate, and gave bond, and proceeded to administer. In May, 1851, they were cited on the motion of Meroney, one of the legatees of Charles Richardson, to make settlement of the executorship of their intestate on his estate; and in April, 1851, they were

cited on the motion of J. L. Richardson, one of the distributees of Mary Richardson, to make settlement of their administration of her estate.

After due notice, all the parties in interest in both these settlements appeared, and agreed, as the parties in interest in both estates were the same, that the whole matter might be blended and one settlement made of both the estates; in the language of the record, "it is agreed that both estates of the said Mary and the said Charles Richardson be blended and considered as one, as the parties in interest to both are precisely the same." A settlement was made, and a decree rendered accordingly on this presumption.

Now, upon reflection, it will appear that this cannot be so.—The parties in interest in the settlement of the estate of Charles R., are his widow and legatees; but the parties in interest in the settlement of the estate of Mary R., are her heirs. The interest which her heirs or children have in the settlement and distribution of her estate may be admitted to be the same, in degree, which they had in that of their father under his will; in both, they would each take an equal child's part. But it will be readily seen, that, in the settlement and distribution of the estate of Charles R., the interest of the widow and that of the children are antagonistical, because their shares must be diminished to the extent of her share. It is impossible, therefore, to blend the settlement and distribution of the two estates, upon the idea that the same parties would be plaintiffs, and the same defendants, in both cases. So far as the stating of the accounts for a settlement goes, Mary Richardson, as executor, and the administrators of Mary Richardson, are the same, it is true, and these would be charged with the duty of stating the accounts in both cases; but in the matter of contesting these accounts, and in the distribution of the assets after payment of debts, the share to fall to a child must be affected by the share that goes to the widow in the one case, and not in the other.

But, if it were possible to blend a settlement of two estates in this way, it is very questionable, whether the Probate Court, whose powers are limited and special, has any jurisdiction that will authorize it; and consent, we know, will not confer jurisdiction. An obvious consequence of rendering one decree on the settlement of two estates, would be, to make it impossible to

hold the sureties on the respective bonds liable, on failure of their principals to pay the amount of the decree; and when minors were concerned, would it be lawful for the court to allow their interests to be jeoparded by such a step, even with the consent of their guardians?

The decree of the Probate Court is reversed, and the cause is remanded, that the court may proceed, in conformity with these views, to settle the two estates separately, pursuant to the will in the one case, and according to the statute in the other.

HARRIS ET AL. *vs.* NESBIT.

1. An incorporated town retains its corporate capacity until its charter is declared forfeited in a direct judicial proceeding: it cannot be held, in any collateral proceeding, to have forfeited its charter by non-user.

ERROR to the Chancery Court of Cherokee.

Heard before the Hon. DAVID G. LIGON.

THE plaintiffs in error filed their bill in the court below against Wilson Nesbit, alleging, that one Jane Lowry, in her life-time, owned and kept a ferry at Cedar Bluff in said county, under a license granted to her by the Commissioners' Court of said county; that, on her death, the said ferry license and privileges were renewed and revived, by grant from said court to complainants, who were the heirs at law of said Jane Lowry; that complainants have kept up said ferry, according to law, from the time of said grant, in 1845; that some time during the year 1846, defendant, having obtained leave from said court, established another ferry within fifty or one hundred yards of that owned by complainants; that there is no town within two miles of complainants' ferry, and that neither the public good nor convenience demanded the establishment of another ferry; that complainants are in no default with respect to their said ferry, and that this proceeding on the part of the defendant is in dero-

gation of their rights, greatly to the prejudice of their interests, and destructive of their chartered privileges. The prayer of the bill is for an injunction against the defendant; that his ferry be abated, and he be decreed forever from keeping up said ferry, without the leave or consent of the complainants being first had and obtained.

On the filing of this bill the Chancellor granted the injunction. The defendant afterwards filed his answer, alleging, among other things, that the town of Cedar Bluff was duly incorporated by an act of the Legislature; that the Commissioners' Court of said county, therefore, have the right to determine how many and what ferries shall be established at that place, because it is an incorporated town; that he was authorized, by regular grant of license from said court, to establish his ferry; and he sets out in his answer said act of incorporation and said order of the court granting his license.

The complainants filed an amended bill, alleging, by way of rejoinder, that only one election had ever taken place under said act of incorporation; and claiming that said charter had therefore been forfeited by non-user, and that Cedar Bluff is not to be considered an incorporated town, and is not within the exception of the statute. The pleadings and evidence contain much other matter, which is not deemed necessary to an understanding of the decision, and is therefore omitted.

On the coming in of the answer the Chancellor dissolved the injunction, and on the final hearing he dismissed the bill; and his decree is now assigned for error.

A. J. Walker, for plaintiffs in error, contended:

1. That the corporation of Cedar Bluff had been dissolved before the establishment of the defendant's ferry, and it had not the power of resuscitating itself; that the succession of individuals composing the corporation was to be kept up, according to the charter, by elections held by managers appointed by the council; that there had long ceased to be any council, and therefore no managers could be appointed, and no elections held; citing Angell & Ames on Corporations, pp. 654, 655; Phillips v. Wilkham, 1 Paige 596.

2. That the town, within two miles of which the Commis-

sioners' Court is authorized to establish ferries, must be an incorporated town.

3. That, if Cedar Bluff was not a town, the Commissioners' Court had no power to establish a second ferry, and this court will interpose by injunction to prevent it.—Yates v. McDaniel, 2 Stewart 211.

ELMORE & DUVAL, *contra*, insisted:

1. That Cedar Bluff was an incorporated town, and therefore defendant's ferry is within the exception of the statute.—Clay's Digest 514 § 29; Pamph. Acts, 1837, p. 41; *ib.* 1842, p. 170. Whether the charter had been forfeited, is a question which cannot be raised in a collateral issue.—2 Kent's Com. 305, 312, note (e), with authorities there cited; 16 S. & R. 140; 1 Penn. R. 421; 2 Gill & J. 126; 6 Cowen 23; 5 Ala. 805; 16 *ib.* 372.

2. That incorporation is not necessary to constitute a town, within the meaning of the statute.—1 Black. Com. 116; Bouv. Law Dic. 265; Clay's Digest 272.

3. That the power to decide upon the necessity for an additional ferry is confided to the Commissioners' Court, from whose decision, so far as that question is concerned, there is no appeal. Jones v. Johnson, 2 Ala. 747; Cox v. Easter, 1 Porter 130.

GIBBONS, J.—"The subject of the forfeiture of corporate franchises by *non-user* or *mis-user*," says Chancellor Kent, "was fully discussed in the case of The King v. Amery, 2 Term R. 515; and it was held, that, though a corporation may be dissolved, and its franchises lost, by non-user or neglect, yet it was assumed as an undeniable proposition, that the default was to be judicially determined in a suit instituted for the purpose. The ancient doubt was, whether a corporation could be dissolved, at all, for a breach of trust. It is now well settled, that it may; but then it must be first called upon to answer. No advantage can be taken of any *non-user* or *mis-user* on the part of a corporation, by any defendant in any collateral action. In the great case of The *quo warranto* against the city of London, in the 34th Charles II, it was a point incidentally mooted, whether a corporation could surrender and dissolve itself by deed; and it was conceded, that it might be dissolved

by refusal to act, so as to have any members requisite to preserve its being. There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for default or abuse of power. The one is by *scire facias;* and that process is proper, where there is a legal existing body, capable of acting, but who have abused their power. The other mode is by information in the nature of a *quo warranto*; which is in form a criminal, and in its nature a civil remedy; and that proceeding applies where there is a body corporate *de facto* only, but who take upon themselves to act, though, from some defect in their constitution, they cannot legally exercise their powers. Both these modes of proceeding against corporations are at the instance, and on behalf of the Government. The State must be a party to the prosecution; for the judgment is, that the parties be ousted, and the franchises seized into the hands of the Government. This remedy must be pursued at law, and there only: a court of chancery never deals with the question of forfeiture."—2 Kent's Com. 312.

Assuming the doctrine of the text above quoted to be correct, (and we have not a doubt that it is so,) the question presented by the record before us is easily solved. Waiving the question, as to whether the term "town," as employed by the statute, (Clay's Digest 514 § 29,) means an incorporated town, or merely a village, if it be true that, when an act of incorporation is once passed in favor of a town, it must be considered as incorporated until said act of incorporation or charter is withdrawn, or declared forfeited by judicial action, then it follows necessarily, that the town of Cedar Bluff is an incorporated town, for all the purposes of this suit. We have no doubt that any place, or collection of houses, incorporated as a town by act of the Legislature, falls within the meaning of the statute. In fact, the argument of the complainants' counsel concedes this. It is conceded, that an act of incorporation was passed by the Legislature of Alabama, and that Cedar Bluff was once an incorporated town. Having once had this character, it will retain it, until the charter is forfeited by judicial decision directly upon the question. It cannot be declared forfeited, for the first time, in a collateral manner, as would have been the case if the Chancellor had proceeded to consider that question in the present suit.

For all the purposes of this record, the town of Cedar Bluff is an incorporated town; and as above remarked, we do not now feel called upon, in the present case, to decide as to the precise meaning of the word "town," as used in the statute above cited.

We have but to add, that the decree of the court below is affirmed, with costs.

LIGON, J., not sitting.

FERGUSON AND SCOTT *vs.* BABER'S ADM'RS.

1. A general demurrer to a declaration containing one good count may be overruled.
2. In an action on a detinue bond, counsel fees for defending the suit in the Circuit Court are recoverable; but counsel fees for defending in the Supreme Court, to which the case was removed by the plaintiff below, cannot be recovered.

(GOLDTHWAITE, J., *dissenting*, *held*, that counsel fees for defending in both courts should be allowed.)

ERROR to the Circuit Court of Chambers.

Tried before the Hon. NAT. COOK.

ACTION OF DEBT by Nathaniel Baber against the plaintiffs in error on a detinue bond. The pleadings are not shown by the record; but the bill of exceptions recites, that the defendants' demurrer to the declaration was overruled, and they thereupon pleaded the general issue, with leave to give any special matter in evidence. On the trial, it was shown that in said action of detinue, judgment was rendered for the defendant therein by the Circuit Court, which judgment was affirmed on error by the Supreme Court; and it was admitted that the plaintiff in that suit had paid all the costs, both of the Circuit and Supreme Courts, before the commencement of this suit. The plaintiff offered to prove the reasonable

value of the services rendered him by his attorneys, in defending said suit in the Circuit Court, and afterwards in the Supreme Court, and that he had paid for such services. The defendants objected to each part of this evidence; but their objections were overruled, and they excepted. There was no proof of malice on the part of the plaintiff in said action of detinue, in prosecuting said suit in the Circuit and Supreme Courts. The court charged the jury, in effect, that the plaintiff in this suit was entitled to recover the reasonable value of necessary counsel fees for defending said action of detinue, both in the Circuit and Supreme Courts; and to this charge the defendants excepted.

The rulings of the court on the demurrer and evidence, as above stated, and the charge given, are now assigned for error.

S. F. Rice, for plaintiffs in error:

1. Where a plaintiff in an action of detinue gives bond at the commencement of his suit, conditioned to be void if he fails in the suit, and pays the defendant "all costs and damages he may sustain by the wrongful suing out of said writ," in the absence of malice, there is no liability on such bond for the fees paid by the defendant to attorneys for defending the action of detinue, nor for fees paid by the defendant to attorneys for services rendered in the Supreme Court on the removal of said suit to that court, by writ of error sued out by the plaintiff in that suit.

2. It is clear, that fees paid by the defendant to his attorneys, for their services rendered in the Supreme Court, on the removal of the cause to that court by writ of error, sued out by the plaintiff in the action of detinue, cannot be regarded as costs or damages sustained "by the wrongful suing out" of the original writ in detinue. These fees are not the "natural and proximate consequences" of the wrongful suing out of the original writ, but of a new suit commenced by the suing out of another and different writ, to-wit: a writ of error. The sureties on the bond (who are sued in this case) cannot be made liable for the issuance of the writ of error, nor for any injury resulting from it, because it is not embraced in the bond.—Hurlestone on Bonds, 57 to 60, top p. (9 vol. Law Library).

3. If such fees could be recovered at all in any suit upon such bond, they cannot be recovered under the declaration in this suit, because they are not averred or set forth in the declaration as damages.—Donnell v. Jones, 13 Ala. 490; Seay v. Greenwood, 21 *ib.* 495.

4. The action on such a bond is not to be governed by all the rules which govern actions on attachment bonds. For instance; it is settled, that in an action on an attachment bond, the wrongful suing out of an attachment means, the suing it out when not a single one of the grounds on which an attachment may be sued out, in fact exists. The wrongfulness of the suing out of an attachment depends on the existence or non-existence of some one legal ground for suing out such process. How can this be applied to the suing out of a writ in detinue? The law does not specify any ground on the existence of which a writ in detinue may be sued out. How then can we determine when such writ is wrongfully sued out? The mere failure in the suit, on the construction of written instruments, as to the meaning of which respectable lawyers and judges might well differ, ought not to be held as proof that the writ was wrongfully sued out. But if so, the damages ought to be confined to the loss of service of the property sued for and seized under the writ, and ought not to extend to attorneys' fees.

5. But the bond set forth in the bill of exceptions in this case is utterly void, and furnishes no ground for a recovery. It is *nudum pactum*, and there was no authority in the clerk, or any other officer, to take or approve it.—Jackson v. The Governor, 15 Ala. 703. The statute authorizes the clerk to issue the writ, upon the plaintiff, his agent, or attorney, making affidavit that the property belongs to plaintiff. If no affidavit is made by the plaintiff, his agent, or attorney, as provided by statute, the clerk has no power or authority to take a bond from the plaintif, nor to require the sheriff to take the property. Where by statute a special authority is delegated "to a particular person, affecting the property of individuals," it must be strictly pursued, and "appear to be so upon the face of the proceedings."—Rex v. Croke, 1 Cowper's Rep. 26; Braley v. Clarke & Peck, 22 Ala. As it does not appear that any affidavit was ever made, nor that

the sheriff ever was required to seize the slaves, nor that the slaves ever were seized, there is nothing to uphold the bond; there is no authority in the clerk to take it, and there is no consideration to support it. No court will enforce it.

6. Each objection to the evidence should have been sustained. The affirmative charge is erroneous. It not only asserted, that upon the whole evidence the plaintiffs below were entitled to recover, but that they might recover the attorneys' fees for defending in the Circuit Court, and also the attorneys' fees for services in the Supreme Court on the writ of error. The charge asked should have been given, not only for the reasons above set forth, but also, because, in no case can attorneys' fees be recovered, except where malice is shown and vindictive damages are recoverable.—Marshall v. Betner, 17 Ala. 832.

M. ANDREWS, *contra* :

1. The demurrer to the declaration being general, it was properly overruled, as the first count was unexceptionable.

2. Attorney's fees for defending the detinue suit must be regarded as a part of the actual damage occasioned by the suing out of the writ, and are therefore recoverable.—Seay v. Greenwood, 21 Ala. 491. The removal of the cause, by writ of error, from the Circuit to the Supreme Court, was merely a continuation of the same cause, so far as the injury flowing from the suing out of the original writ is concerned. Barron v. Pagles, 6 Ala. 422; Wiswall v. Moore, 4 *ib.* 9.

CHILTON, C. J.—The demurrer in this case to the declaration is not set out in the record, and, as every reasonable intendment is in favor of the regularity of the judgment, we must regard it as a general demurrer to the declaration; and so treating it, the court committed no error in overruling it, as it is well settled, that upon a demurrer to the whole declaration, although it may contain bad counts, yet, containing one good one, the demurrer must be overruled. There can be no question as to the sufficiency of the first count; it is in the usual form in debt on the penal part of the bond.

2. The next, and main inquiry, is, as to the admissibility of

the evidence of payments made by Baber for attorneys' fees in defending against the action of detinue in which this bond was given, as also in defending in the Supreme Court after the cause was taken up on writ of error, Scott having proved unsuccessful in both courts.

As to the cost reasonably incurred in the Circuit Court, and the payment of such compensation as was required to obtain the services of competent counsel to make his defence in that court, we entertain no doubt, under our former decisions, that they should have been recovered, and consequently the evidence as to such damage was properly admitted. The employment of counsel to defend is a consequence which naturally or ordinarily results from bringing a suit to assert and maintain a controverted claim; and the fees paid to them, in order to make defence, legitimately constitute a portion of the damage to which the defendant is subjected within the meaning of the condition of the bond, which provides for the payment "of all costs and damages the defendant may sustain by the wrongful suing out of said writ."—Seay v. Greenwood, 21 Ala. R. 491, 496. The damages here meant are those which are the natural or ordinary result of such a wrongful suing out of detinue process, and obtaining an order of seizure. The injury to the defendant in being deprived of the use of his slaves, or the expense and trouble in replevying them by giving bond, the expense incident to defending against the suit in the employment of counsel, and the ordinary court costs, are all proximate injuries, which the obligors in the bond must be supposed to have had in contemplation when they executed it, as included in their obligation to pay and satisfy.

But with regard to the fees of counsel for defending the case when taken by writ of error to this court, we find more difficulty.

The general rule is, that the liability of sureties will never be extended by implication, but the condition will, in general, be construed strictly in their favor. The bond before us contemplates the payment of such damages as may have been occasioned by the wrongful suing out of the writ, if the plaintiffs should fail in this suit. The condition is broken immediately upon the plaintiffs' failure in the suit, if any cost or damage has been sustained by the defendant, which then remains unpaid.—

The suit being thus finally decided, upon payment of all costs and damages which it has occasioned, the sureties have complied with their engagement; and so long as this final adjudication remains in full force, this suit can work no additional damage for which they can be held liable in virtue of their bond. They enter into no covenant that their principal shall not make motions in the court with reference to collateral matters, which may or may not grow out of it, and the defence of which may be attended with cost to the defendant; as, for example, the attempt to set aside the sale of the plaintiff's land, made under an execution issued on the judgment for cost against the plaintiffs. These are remote and collateral matters, which may or may not arise, and which cannot be fairly presumed to have been in the contemplation of the parties to the obligation, and consequently are not embraced by it. They may often happen, but are not the natural and ordinary consequences from the suing out of the original process. So with respect to suing out a new writ—a writ of error—to revise the proceedings in this court. The costs of this court have never been considered as recoverable against the sureties, in a bond given as indemnity for costs in the court below. Non-residents, for many years past, have been required to give security for cost in the first instance, or their suits were subject to be dismissed; but there is no instance where such security has been held liable for the costs of this court. Yet the usual form of the obligation was, that the party bound himself as surety for cost in the particular suit on behalf of the plaintiff. This uniform practice is persuasive to show, that the bond is considered as providing indemnity only with respect to the cost and damages which may be occasioned by the suit in the primary court. Besides; although the final judgment in the court below is the subject matter upon which the writ of error is based, the writ of error is in the nature of a new suit, and cannot be said to be the natural or ordinary result of the first suit, any more than the motion, to which we have alluded, to vacate a sale, or a bill in chancery to vacate the judgment upon some supposed equitable ground. To hold that the bond in this case would embrace the *costs* of this court, would, we think, be to enlarge the undertaking of the sureties by implication, in violation of the general rule we have above stated; and if the costs, which are the nec-

essary result of an unfounded allegation of error, be excluded, much more should fees to counsel, which are but consequential, and may or may not be incurred at the option of the defendant, be excluded.

It follows from what we have said, that the court below erred in allowing fees paid to counsel in the Supreme Court to be recovered, as a part of the damage provided against in this bond.

The judgment is consequently reversed, and the cause remanded.

GOLDTHWAITE, J.—I dissent from the opinion of the majority of the court, as to whether the expenses paid for counsel fees in the Supreme Court cannot be recovered in this action, upon a special averment in the declararion.

I understand the case of Seay v. Greenwood, 21 Ala. 492, to decide, that in an action on the case for wrongfully suing out an attachment, the reasonable expenses paid by the plaintiff in defence of the attachment suit, in the court to which it was returnable, are part of the actual damages occasioned by the act complained of, and as such are recoverable. Here the action is on the bond given by the plaintiff in the detinue suit, and conditioned according to the statute (Clay's Digest, 317 § 31) for the payment of all costs and damages the defendant may sustain by the wrongful suing out of the writ; and as we have held, in the case cited, that the counsel fees in the Circuit Court, if paid by the plaintiff, are actual damages properly chargeable to the suing out of the writ, it can make no difference that the suit is on the bond; for the condition is to pay the damages the party may sustain, and it would be a strange thing to hold, that actual damages in case were one thing, and in another action, for identically the same act, they were another and a different thing.

It appears to me also, to follow as a direct conclusion from the case cited, that all the expenses which the defendant in the first case was reasonably required to pay, to protect himself from the direct consequences of the wrongful act, must be regarded as actual damages resulting from that act, and as a proper and legitimate subject of recovery, as the fees paid to a physician for attendance on a slave warranted sound. Suppose

that a defendant found it necessary, to protect himself against a malicious prosecution, to take the case to the Supreme Court, Would not the costs and expenses in that court be part of the actual damages occasioned by the prosecution, and recoverable as such? and if so, upon the principle of the case referred to, they would be recoverable in an action on the case for any other wrongful act.

It is not denied, that it is the wrongful act of the defendant in the first suit which gives him the right to take the case to the Supreme Court. The case in that court had its origin in the court below, and it originated there by the act of the principal in the bond:—it is his act which has brought it to the appellate court, and although the taking of it there, is, as to the rules which apply to and govern the writ of error, to be considered as a new action, it is, so far as the rights of the parties are concerned, in the aspect I am now considering them, but a continuation of the former suit.

But it is said that these damages are not the actual or proximate consequences of the act—that they are too remote. The use of these terms I can understand, when applied to particular cases; but when used as a rule for the ascertainment of damages, they are wanting in precision and accuracy. In the well known case of Scott v. Shepherd, 2 W. Black. 892, the first thrower of the squib was held responsible, though it had passed through the hands of two other persons; and the defendant, who went up in a balloon, which descended in the garden of the plaintiff, and attracted a crowd who trampled down his vegetables, was held liable for the damages done by the crowd.—Guille v. Swan, 19 Johns. 381. So, in the case of Lewis v. Peake, 7 Taunt. 152, where the action was for a breach of warranty, the declaration alleging that the plaintiff, confiding in the defendant's warranty, re-sold the horse with warranty, and was thereby subjected in an action against him to pay the costs, amounting to a certain sum, besides the price of the horse; and he was allowed to recover the costs thus paid. In neither of the cases were the damages recovered the natural and proximate consequences of the first act, in the usual sense in which those terms were used. In the last, it was the warranty of the defendant which caused the warranty of the plaintiff, and the warranty of the plaintiff caused him to pay the

cost, which were held recoverable against the first warrantor.—In the case before us, the counsel fees in the Supreme Court were as essential to an effectual protection of the plaintiff's right, as the fees paid in the court below; they were caused by the wrongful act of the principal in the bond; they were not speculative damages, and in my opinion, on principle and authority, not too remote to be recovered.

STAINTON'S ADM'RS *vs.* SIMMONS AND SIMMONS.

1. The plaintiff in the execution, under which a sale is made by a constable, is not a necessary party to a motion to set aside the sale on the ground that the constable had no authority to make it.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. JOHN A. CUTHBERT.

JOHN STAINTON, the intestate of the appellants, made a motion, before a justice of the peace, to set aside a constable's sale, on the ground that the constable had no authority to make it, inasmuch as one of the executions in his hands had been quashed before the sale, and the other had been fully paid off and satisfied. The justice refused to set aside the sale, and the plaintiff in the motion took the case, by appeal, to the Circuit Court. The constable and the purchaser at the sale were the only defendants to the motion. In the Circuit Court, the defendants moved to dismiss the motion, because the plaintiffs in the executions were not made parties to the motion; and this motion was sustained by the court. This judgment is here assigned for error.

S. J. CUMMING, for appellants.

R. C. TORREY, *contra.*

LIGON, J.—There was no necessity to make the plaintiffs in the executions, under which the officer pretended to sell the property, parties to the motion to set aside the sale. They had no interest whatever in the controversy between the officer and the defendant in execution, arising out of the misconduct of the former in executing the process in his hands. The only parties in interest were, the constable and the purchaser at his sale. These were before the court; and the case should not have been dismissed, but the court should have heard it on its merits.

In the case of The Mobile Cotton Press Co. v. Moore & Magee, 9 Porter 679, the only parties to the motion were the defendant in execution, as plaintiff, and the sheriff and the purchaser of the lands, as defendants; and this court proceeded to consider and determine the motion. It is true, no exception appears to have been taken in the court below, or in this court, in regard to the parties in that case; but, we apprehend, it would have been unavailing, if it had been made, inasmuch *as the act complained of was not that of the plaintiff* in the writ of *fi. fa.*, but of the sheriff himself in the execution of that writ; and the profit, if any, arising out of the abuse of process, did not, and could not, accrue to the plaintiff, but to the purchaser at the sale of the officer. The plaintiff in the execution is never a necessary party to such motions, unless it is shown that he is the purchaser, or is interested in the purchase, and it is then necessary to bring him before the court in that capacity.

Let the judgment be reversed, and the cause remanded.

MOSELEY *vs.* WILKINSON.

1. Where plaintiff declares in case on defendant's omission of duty, in neglecting to treat a hired slave with proper care and attention during the term, the consideration and terms of the contract of hiring need not be alleged; and if alleged, they need not be proved as averred.
2. If a slave is hired for a particular service, and is afterwards employed in a

different one, this is a conversion for which the owner may bring trover, and recover the value of the slave with interest from the time of conversion; but if, with full knowledge of the conversion before the expiration of the term, he receives the stipulated hire for the entire term, he is estopped from afterwards bringing trover.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. ROBERT DOUGHERTY.

ACTION ON THE CASE by Robert A Moseley against Beverly N. Wilkinson; the declaration containing two counts in case and one in trover. The first count alleges, that plaintiff hired and delivered to the defendant two slaves, "for a certain reasonable reward to be paid to said plaintiff in that behalf," from the first day of February, 1844, until the first day of January, 1845; that it thereby became and was defendant's duty, to treat said slaves with due and proper care and attention, and, in case of sickness, with proper medical treatment and attendance; that one of said slaves, during said term of hiring, became sick, and required medical treatment, which defendant, disregarding his said duty in that behalf, wholly failed and neglected to furnish; by means whereof, said slave died, &c. The second count alleges the contract of hiring of the slaves on the same consideration, and for the same space of time, "to be used by said defendant in the city of Montgomery, while so hired by him, and the said Adeline to be used by him as a cook"; "yet said defendant, in breach of his duty in that behalf, used said slave Adeline otherwise than as a cook and in said city of Montgomery, by working in the field and a plantation beyond the limits of said city of Montgomery, on" &c.; "by means whereof, she died, and became and was wholly lost to plaintiff." The third count is in trover.

The defendant pleaded, that the said slave went into his possession under a contract of hiring until the first day of January, 1845, and that before that time she died; that the plaintiff afterwards, with full knowledge of her death, and of defendant's use, treatment and disposition of her, received and collected the note for the hire during the entire term, thus ratifying defendant's use and treatment of her during the term. He also pleaded not guilty to each count, and *non assumpsit* to the first and second counts.

On the trial, plaintiff introduced a witness, by the name of Moseley, who testified, that he was present when the contract of hiring between the parties was made; that the hiring was to continue until the first day of January, 1845 (but he afterwards stated, on cross examination, that it was to terminate at Christmas preceding); that defendant gave his notes for the hire, two for $45 each, and one for $50, due January 1, 1846; that said girl Adeline was hired to the defendant to cook for him, and that defendant lived in the city of Montgomery; that after the price of hiring was agreed on, but before the delivery of the negroes to the defendant, or the execution of the notes, plaintiff told defendant, that he hired his negroes in the city of Montgomery because it was healthier than the country; that in April, 1845, defendant re-hired said Adeline to one Hughes, who lived in the county about three miles from the city of Montgomery, where she was worked in the field, and died in the latter part of July of that year." There was evidence that the girl was neglected in her sickness; no physician was called in, but she was treated medically by Hughes's overseer, under whose treatment she died, and there was evidence that this treatment was improper; but on these points, as to neglect and treatment, the evidence was conflicting. It was also in evidence, that the place where Hughes lived was, in general, more unhealthy than the city of Montgomery, but that it was healthier than said city in the year 1845; that after plaintiff had full information that the girl Adeline was hired to Hughes, and of her death, and the circumstances of her sickness and treatment, he disposed of the notes given for the hire in October, 1845, before the commencement of this suit, to one Noble, for a valuable consideration, without any deduction therefrom, and that defendant paid them to said Noble, when due, without any deduction therefrom; all of which occurred before this suit was commenced.

The court charged the jury, that, if the terms of the contract of hiring were truly stated by the witness Moseley, and if, by its terms, the hiring was to continue until Christmas, and not to the end of the year, then plaintiff could not recover upon the first and second counts of his declaration; to which charge the plaintiff excepted.

The court also charged, that, if the terms of said contract

were truly stated by said witness Moseley; and if, afterwards, said defendant hired said Adeline to said Hughes, before the expiration of the term of hiring, and she was worked in the field, and died; and if plaintiff, afterwards, and before this suit was commenced, with full knowledge of all the facts and circumstances concerning her hiring to Hughes, her sickness, treatment and death, disposed of said notes given for the hire, for a valuable consideration, without any deduction therefrom; and if defendant, afterwards, and before this suit was commenced, paid off said notes to Noble, without any deduction therefrom, then plaintiff cannot recover under the third count in his declaration; to which charge the plaintiff excepted.

N. Harris and John A. Elmore, for appellant:

1. The action being case, and the contract being inducement merely, a variance in the allegation and proof, as to the time when the term of hiring terminated, was immaterial. The gravamen of the action was, the defendant's neglect of duty in not providing proper medical attendance for the girl during the term.—1 Chitty's Pleadings 290, marg. note 291.

2. The plaintiff was entitled not only to the hire during the term, but also to a return of the negro at its expiration. If he was entitled to both, the fact that he received the hire for the entire term cannot deprive him of the right to recover for the conversion during the term, any more than it would deprive him of the right to a return of the slave.—Perry v. Hewlett, 5 Port. 319; Ricks v. Dillahunty, 8 *ib.* 153.

S. F. Rice, T. Williams and Thos. H. Watts, *contra:*

1. Although driving a hired horse a greater distance than is agreed, or in a different direction, is a conversion, yet receiving payment for the whole distance or route actually travelled, with a full knowledge of the facts, will bar an action of trover for this cause.—Rotch v. Hawes, 12 Pick. R. 136. And a ratification of a tortious taking, will defeat an action of trover.—Hewes v. Parkman, 20 Pick. R. 90.

2. It is a rule, that if a necessary inducement of the plaintiff's right, &c., even in actions for torts, relate to, and describe, and be founded on a matter of contract, it is necessary to be strictly correct in stating such contract, it being matter of

description; and a variance is as fatal, as if the action had been brought on the contract.—Williamson v. Allison, 2 East 452; 1 Chitty's Pl. 385; Myers v. Gilbert, 18 Ala. 467; Felix v. The State, *ib.* 720; 1 Green. Ev. § 65; 1 Stark. Ev. 374; 1 Chitty's Pleadings, 228, 229, and notes. The variances are numerous and fatal: I. In the first and second counts, the allegation is that the contract of hiring was made on 1st February, 1844, and that the term of hiring was from that day until the first January, 1845. The evidence of Moseley is, that the contract was made in January, 1845, and the term of hiring until Christmas of 1845. II. The allegation is, that the contract was "for a certain reasonable reward," not fixing any sum. The evidence is, that one of the negroes was hired for $50, and the other for $90, and notes given accordingly for such hire. III. The allegation in second count is, that by the terms of the contract, Adeline was to be used by defendant in the city of Montgomery, the said Adeline to be used by him as a cook. The evidence of Moseley shows that such were not the terms of the contract. These and other variances between the contract of hiring as alleged and described in the first and second counts, and the terms of the contract as proved by the witness, authorized the first charge, which relates only to those two counts.

3. The contract, by its terms, does not deprive Wilkinson of the right to re-hire the slave to another. There is no term in the contract, either as alleged or proved, that he should not re-hire the slave. And the whole argument of plaintiff in error assumes erroneously that there is such a term in the contract.

GOLDTHWAITE, J.—One of the distinctions between *case* and *assumpsit* is, that if the former action be brought on a breach or omission of duty growing out of a contract, the contract itself need not be formally stated in the declaration (1 Ch. Pl. 124, 335), unless it constitutes a material part of the plaintiff's case.—Bevan v. Jones, 6 D. & B. 483. Here the cause of action, as stated in the first count, is not on the contract of hiring, but for an omission of duty, in not treating the slave with proper care while she was hired. The terms of the contract were entirely unnecessary; and whether the slave was hired until Christmas, or until the first of January, could not affect the plaintiff's right to recover, if, during the time she was

hired, the defendant let her die for want of attention.—Stoddart v. Palmer, 3 B. & C. 2. The same rule holds as to the statement of the consideration of the contract. It matters not, in this case, what was the consideration. The right to recover does not depend upon it, and whether it was an amount certain, or as much as the hire was reasonably worth, is altogether immaterial. The recovery on this count depends upon the omission of duty, and not upon the amount of hire to be paid.

So, if the slave was hired to work as a cook, and was employed to work in the field, and died because she was thus employed, it is not necessary, in framing the declaration in case, as we have seen, to state the consideration formally. The gist of the action is the breach of the duty, and no more need be stated than is necessary to show the duty and the breach.

Upon the first count, therefore, if the evidence proved that the slave was hired by the plaintiff to the defendant, and while thus hired she died from the want of proper care, or from improper treatment, on the part of the latter, the plaintiff would be entitled to recover, without reference to the term of hire as stated in the declaration, or the allegation as to the amount to be paid; and upon the second count, if the duty and the breach were shown, it is enough.

As to the charge of the court in relation to a recovery on the count in trover: If a slave is hired for a particular service, and is employed in one different from that contemplated by the contract, this is a conversion, and the owner may rescind the contract, or treat it as never existing, and bring trover (Hooks v. Smith, 18 Ala. 338); and in that action, he may recover the value of the slave, with interest from the time of the conversion. But, if he elects to pursue that course, he would not be entitled to hire, as such, after the date of the conversion. We have no decision going to that length; and as we have held, that the property may be changed by a recovery in trover, to give the party who has recovered in trover the hire accruing after the conversion, would be the same as to give him hire which accrued after he had sold the property to the defendant. The same rule must hold as to the converse of the proposition. The owner is not entitled to the hire for the full term, and damages which cover a portion of the same term; he cannot treat the contract as a sale and a bailment both; and if, with a full

knowledge of the conversion before the time of hire has terminated, he receives pay for the entire term, he, by this act, asserts his right to the hire which accrued after the conversion, and is estopped from maintaining any action which, from the rules which govern it, is inconsistent with the right thus asserted.

As to his right to recover in case for breach of duty, in which it might be competent for the jury, in ascertaining the injury, to look to the fact that he had received the hire for the entire term in mitigation of damages, as we do not consider the question presented upon the present record, we express no opinion.

Judgment reversed, and cause remanded.

HENRY *vs.* BLACK'S ADM'RS.

1. An endorser who pays a note may present his claim, at any time within six months after the payment, against the estate of a prior endorser, which was declared insolvent more than six months previously, although the holder failed to present the note as a claim against the estate.

APPEAL from the Court of Probate of Marshall.

BRICKELL & CABANISS, for the appellant.

LOUIS WYETH, *contra.*

PHELAN, J.—Henry was the fourth and last endorser on a note for $300, made by one Wheeler, and endorsed by T. B. Rector, F. L. Rector, William Black, and plaintiff in error, in the order in which their names are stated. Said note was dated 2d September, 1844, payable at six months, and was held by the Branch Bank at Huntsville.

Black's estate was duly declared insolvent, 14th of August, 1848. On the 13th of April, 1849, more than six months after, Henry paid the balance due on said note to the Bank, and on the 17th of April filed his claim on account of the payment of said balance ($161 17), as a claim against the

estate of Black, in the clerk's office. Upon the settlement it was objected to this claim, that it had not been filed within six months after the estate had been declared insolvent; and the court rejected the claim on that ground.

Until the payment of the balance due on the note, Henry had no claim against the estate of Black. His claim or demand then first accrued; and we have held, in the case of Powe & Smith v. Tyson's Ex'rs, 15 Ala. 221, that the presentation or filing of a claim, within six months after it accrues, is sufficient under the equity of the statute (Clay's Dig. 194 § 10); and that the neglect of the holder of the note to file or present it within the six months, will not affect a surety who pays it after that time.

There is no just distinction to be taken, as we conceive, between the case of a surety on the face of a note, and an endorser, as respects the right to present the claim within six months after he has paid it, against the estate of the maker or any prior endorser, which may have been declared insolvent more than six months before such payment.

The claim was filed in due time, and should not have been rejected on that ground.

The judgment of the court below is reversed, and the cause remanded.

GILBREATH, JUDGE &C., *vs.* MANNING ET AL.

1. In debt on an administration bond, to charge the sureties with the amount of a decree of the Orphans' Court, the declaration alleged that a final settlement was had by the administrator with the Orphans' Court, "and on said final settlement the sum of $259 was, *by the decree and judgment of said court, assessed and decreed as the distributive share*" of the person for whose use the suit was brought, who was one of the distributees of the estate: *Held*, that the declaration was defective on demurrer, because it showed no judgment in favor of any one for the amount, and no order on the administrator to pay the money to any one.

ERROR to the Circuit Court of Marshall.

Tried before the Hon. JOHN E. MOORE.

ACTION OF DEBT on an administration bond, in the name of the Judge of the County Court of Marshall, for the use of Zaccheus C. Kinnamer, administrator of Julia Law, deceased, against the defendants in error, who were the sureties of William Black on his bond as administrator of Wyatt Law, deceased. The declaration was twice amended, by leave of the court below, and twice demurred to; and each time the demurrer was sustained. On the last trial, a demurrer was again sustained to the declaration, and from this decision this writ of error is prosecuted.

The declaration, as last amended, sets out the bond on which said sureties became liable, alleges that said Julia Law was one of the distributees of the estate of Wyatt Law, deceased, and then proceeds as follows: "And the said plaintiff further avers, that said William Black, as administrator of said Wyatt Law, deceased, and while said bond, or writing obligatory, executed by said defendants and said William Black, as aforesaid, was in full force, and while said William Black was administrator as aforesaid, at to-wit: the court house of said County of Marshall, and in said county, to-wit: on the 20th day of January, A. D. 1845, at the instance of said William Black, administrator as aforesaid, did make, with the Orphans' Court of said county, which then and there had jurisdiction thereof, a final settlement of said estate of said Wyatt Law, so administered by said William Black as aforesaid; and on said final settlement in said Orphans' Court, at the instance of said William Black, as administrator as aforesaid, the sum of two hundred and fifty-nine dollars and ninety-six and one half cents was, by the decree and judgment of said Orphans' Court, assessed and decreed as the distributive share of said Julia Law, a daughter and heir at law of said Wyatt Law, deceased; and said plaintiff avers, that said William Black, then and there, had in his hands, as administrator as aforesaid, the said sum of two hundred and fifty-nine dollars and ninety-six and one half cents, and that he afterwards," &c., "wasted the same." The declaration contains no other allegation, relative to said final settlement, and the decree then rendered.

The only error assigned is, the sustaining of the demurrer to the declaration.

B. T. POPE and S. F. RICE, for plaintiff in error.

BRICKELL & CABANISS, and J. W. SHEPHERD, *contra*.

GIBBONS, J.—We concur in the opinion of the court below, in sustaining the demurrer to the plaintiff's declaration. It was defective, in not stating that a judgment was rendered, by the Orphans' Court of Marshall, in favor of the said Julia Law or her representative, for her distributive share of the estate of her father, or an order for the payment of the said distributive share, to her, or her legal reprepresentative, by the said administrator William Black. The declaration simply states, that a final settlement was had, and the distributive share of the said Julia ascertained; but it states no judgment in her favor, nor in favor of any one, for the amount, and no order on the administrator to pay the money to any one. The declaration, stopping where it does, falls within the principle decided in the case of The Judge of the County Court of Limestone v. French, 3 Stew. & P. 263; and on the authority of that case, the judgment of the court below is affirmed.

WEAVER *vs.* JONES.

1. *Assumpsit* for use and occupation does not lie against a mere naked trespasser.
2. A bond for title, given by an infant, is not absolutely void, but voidable only.
3. If an infant disaffirm his contract of sale on arriving at full age, and sue his vendee for use and occupation, the latter may recoup for valuable improvements erected on the land.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. EZEKIEL PICKENS.

ASSUMPSIT by Emmett Jones against Philip J. Weaver, for the use and occupation of land. The facts sufficiently appear in the opinion.

LAPSLEY & HUNTER, for plaintiff in error:

The charge of the court is clearly erroneous. It assumes, as a principle of law, that all contracts made with minors, not advantageous to them, are absolutely void; whereas they are only voidable.—Oliver v. Handlet, 13 Mass. R. 237; Whitney v. Dutch, 14 *ib.* 461; Story on Contracts, p. 47 § 58; 2 Kent's Com. 235. The charge threw the burthen of proof on the defendant below, to show that the contract was advantageous to the minor, while the authorities require, that the contract must be prejudicial to the minor, before the court can declare it void; if it is doubtful or indifferent, the contract is only voidable.—Zouch v. Parsons, 3 Burr. 1765; Keane v. Boycott, 2 H. Black. 511. In the case of West v. Penny, 16 Ala. 186, this court held the contract voidable only, and yet no advantage to the minor was shown; indeed, in that case, the contract could not, in any event, have been advantageous to him. It is laid down as a general rule, in that case, that the courts lean to construing the contracts of infants to be voidable only. The contract must appear, upon its face, to be prejudicial to the infant, before a court will declare it void.—Bingham on Infancy; Fant v. Catchcart, 8 Ala. 725; Tucker v. Moreland, 10 Peters 58.

The defendant below was entitled to recoup for the valuable improvements which he had put upon the land in good faith, before the disaffirmance of the contract. The privilege of infancy is to be used as a shield, and not as a sword. Where a party rescinds a contract, he must put the other party *in statu quo*; that is, in the same condition as if the contract had never been made; he must account for improvements made *bona fide*.—Pharr v. Bachelor, 3 Ala. 237; Gillespie v. Battle, 15 *ib.* 276; 2 Kent's Com. 240; Holmes v. Blogg, 8 Taunt. 580; McCoy v. Huffman, 8 Cowen 84; Badger v. Phinney, 15 Mass. 359; Roberts v. Wiggins, 1 N. H. 73; Roof v. Stafford, 7 Cowen 179; 2 Eden's R. 72; 6 N. H. 339; Cullum v. Branch Bank at Mobile, 4 Ala. 21; 7 Ala. 742; 2 Bibb 45; 3 A. K. Marsh. 202; 3 Bibb 31; 3 Litt. 391; 4 *ib.* 371; 5 *ib.* 77; 1 J. J. Marsh. 404.

WM. M. MURPHY, *contra :*

1. This was a bond with a penalty, made by an infant, and therefore not voidable merely, but absolutely void. An infant cannot bind himself with a penal bond, even for necessaries.—McPherson on Infants, p. 498, cited with approbation in Fant v. Catheart, 8 Ala. 730.

2. It is unnecessary to consider whether the bond was void or voidable; "if it was voidable only, and has been avoided, the same rusult will follow."—Tucker v. Moreland, 10 Peters 71, *per* Judge Story. Here, the contract was, in fact, rescinded, the purchase money refunded, and the bond cancelled.

3. In cas of a lease by an infant, he can disaffirm the contract and treat the lessee as a trespasser.—Story on Contracts, p. 26; Blunden v. Baugh, Cro. Car. 303, 306.

4. The recoupment of damages for valuable improvements, is only applicable in suits brought to recover the possession of lands.—Clay's Digest 320 § 47. This is an action for use and occupation, commenced while plaintiff was in possession. There can be no recoupment, where there is no cause of action; recoupment is in the nature of an unliquidated set-off, and must arise out of the contract sued on.—Hatchett v. Gibson & Bro., 13 Ala. 587.

CHILTON, C. J.—Jones sued Weaver in *assumpsit*, for the use and occupation of a lot in Selma. It appears from a bill of exceptions, which was sealed upon the trial, that the plaintiff, Jones, while an infant, had sold the lot, and executed his bond for title in the usual form; after he arrived at age, he disaffirmed the contract, paid Weaver back the purchase money, with the interest, and received back his bond. Weaver, in the mean time, had made valuable and permanent improvements on the lot, in the erection of a livery stable. This suit is brought by Jones, to recover rent for the time Weaver occupied the lot; and Weaver insists, that he should be allowed to recoup the value of his improvements, which gave to the lot its principal yearly value; the rent, aside from such improvements, being quite inconsiderable.

The court, among other things, charged the jury, that, if the plaintiff (Jones) was a minor at the time of selling the lot, and they should find that such sale was not an advantageous one to

the plaintiff, then the contract would be void, and the damages could not be recouped.

The counsel for the defendant in error endeavors to maintain the correctness of this charge, upon the alleged ground, that a bond with a penalty, given by an infant, is absolutely void, and that being void, the defendant below must be regarded in the light of a mere trespasser, and as such not entitled to recoup for improvements.

If this position be correct, we think it is very clear, the plaintiff, Jones, has no standing in court; for the action of *assumpsit* will not lie, in the absence of a contract either expressed or implied; and no contract for the payment of rent is implied, by law, as against a mere naked trespasser. The owner, in such case, must resort to his action of trespass, to recover damages for the tortious entry and holding of the premises. True, there are cases, where the owner of a term may elect to treat one who trespasses on him as his tenant, after the term expires; for, otherwise, he would be remediless. Such was the case of Catterlin v. Spinks, in 16 Ala. 467. So, also, in cases of permissive holding, as where the party in possession holds under a verbal contract of purchase, which he repudiates. The case of Davidson v. Earnest, in 7 Ala. 817, furnishes an illustration of this latter class. See also Rochester v. Pierce, 1 Camp. 466, and Hull v. Vaughn, 6 Price Exchq. Rep. 157. If, however, the bond in this case be absolutely void—a mere nullity—and the party a mere trespasser, the case falls under neither of the qualifications above stated. There would be no demise, express or implied, and no permissive holding. To entitle the plaintiff below to a recovery, it is, therefore, necessary to affirm the validity of the bond for some purpose, as amounting at least to a permission to the plaintiff in error to occupy.

But is a bond for title, given by an infant, an absolute nullity? The old cases, and several elementary writers who follow them, maintain the affirmative of the proposition; but we think it clear, both upon principle and the current of modern cases, that it is not.

The object of the rule which enables an infant to repudiate his contracts, when he arrives at full age, is to furnish him a shield or protection against the improvident bargains he may

enter into, resulting from presumed incapacity, by reason of his youth, to contract. It may often happen, that his contract may prove a very beneficial one to him, and he may desire, when of age, to affirm it, which he could not do, if it were void.

The better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with perhaps one exception) absolutely void by reason of non-age; that is to say, the infant may ratify them, after he arrives at the age of legal majority.—Parsons on Contracts, 224 and notes; 1 Amer. Leading Cases 103, 104. The rule, as recognized by the charge, that the court, or (as in this case) the jury, must determine whether the contract was beneficial or prejudicial to the infant, and hold the contract voidable or void according to the result of such finding, has been rejected by many of the courts in modern times, as unsatisfactory and unsafe in its application, and as often contravening the principle upon which it was founded, namely, the benefit of the infant. It is certainly more conducive to his benefit, to afford him the opportunity of affirming, when of age, a contract which he may determine to be beneficial, than for the court or jury to determine this question for him.—15 Wend. Rep. 631; 1 J. J. Mar. Rep. 236; Parsons on Con., note e to page 244.

We must consider Weaver as holding possession of the lot under a contract for its purchase, which was voidable, and as holding by permission of Jones, the plaintiff, who may, therefore, treat him as his tenant, and maintain this action of *indebitatus assumpsit* for use and occupation.

The question then arises, What damage has Jones sustained, by the failure of Weaver to comply with the implied assumpsit to pay reasonable compensation for the use of the premises?

In this equitable action of *indebitatus assumpsit*, can the plaintiff recover for the use and enjoyment of permanent and valuable improvements, which the defendant himself has erected, without allowing a discount or abatement of his recovery by way of compensation for such improvements? If they were erected in good faith, under a contract of purchase, which, though voidable, was not void, we feel satisfied that, when the infant disaffirms the contract, the law will not raise in his favor an assumpsit on the part of the defendant to pay for the use of the permanent improvements made upon the faith of the con-

tract, without considering the improvements, and abating the recovery to the extent of their permanent value. It is thus that the courts give effect to the general rule, that in actions arising upon contracts, the plaintiff recovers the actual damage sustained.—Sedgwick on Damages, pp. 430 to 446; 2 Greenl. Ev. 208. And if such be the rule in regard to express contracts, much more would the court look to circumstances growing out of, and connected with an implied undertaking.—See upon recoupment, 13 Ala. 594; 2 Denio 616.

It follows, therefore, that the court erred in respect of the claim for improvements by way of recoupment.

We deem it unnecessary to examine the other questions raised upon the admission of evidence, since it is probable that they may not arise upon a subsequent trial.

Let the judgment be reversed, and the cause remanded.

STEVENSON *vs.* REAVES.

1. In *assumpsit* for a breach of warranty of the soundness of a slave, the court charged the jury, "that, if defendant made any false and fraudulent representations to plaintiff, they would be considered by the jury, with the other evidence in the cause, for the purpose of determining whether there was a warranty, a breach of the warranty, and the amount of plaintiff's damages for breach of the warranty; but for that purpose only, *and not as a ground of recovery*": *Held*, that the charge was erroneous, as it asserted the proposition, that such declarations, although they might have amounted to a warranty, would not constitute a ground of recovery in this action.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JOHN GILL SHORTER.

ASSUMPSIT by Hardy Stevenson against Asher Reaves, for a breach of warranty of the soundness of a slave. On the trial, the plaintiff proved, that he had purchased the slave from the defendant, at the price of $540, as sound property, and that she was not sound at the time of sale; that she would have been

worth, if sound, at the time of sale, between $500 and $600, but, in her real condition at that time, she was not worth $50. "He also introduced evidence tending to prove, that the defendant, at the time of the sale, represented said slave to be sound, and to be deceitful in pretending to be sick frequently; and that defendant said, all she wanted was a master to drive her, and represented her to be a breeding woman, and as a slave of good qualities and capacity for household and field work"; that said slave was, at the time of said sale, incapable of conception or bearing children, and that defendant had owned her some six years; that, at the time of the sale, he had been deceived by the false and fraudulent representations of the defendant, as to the qualities, condition, and soundness of said slave; but on all these matters, which plaintiff's evidence tended to prove, there was a conflict in the evidence.

The court charged the jury, "that plaintiff's declaration in this case was in *assumpsit*, and that, to entitle him to recover, he must prove that there was a warranty of soundness of said slave, and a breach of said warranty; that, if defendant made any false and fraudulent representations to plaintiff, they would be considered by the jury, with the other evidence in the cause, for the purpose of determining whether there was a warranty, a breach of warranty, and the amount of plaintiff's damages for breach of warranty; but for that purpose only, and not as a ground of recovery." To this charge the plaintiff excepted, and he now assigns it for error.

Belser & Rice, for appellant:

A representation to the vendee that a slave is sound, made by a vendor who knows it to be false, is, in law, a warranty. —Lobdell v. Baker, 1 Metcalf 201; Cook v. Moseley, 3 Wendell 277; Wood v. Smith, 4 Carr. & P. 45, or 19 E. C. L. R. 267. The charge of the court asserted, in effect, that false and fraudulent representations, alone, could not authorize a recovery; whereas the law is, that the jury might, from such representations alone, if there was no other evidence of a warranty, find for the plaintiff in an action of assumpsit.—Wood v. Smith, *supra*; Hillman v. Wilcox, 30 Maine 170; Wood v. Ashe, 3 Strob. Law R. 64; Cook v. Moseley, *supra*; Roberts v. Morgan, 2 Cowen 438. If the vendor's false and fraud-

ulent representations, in this case, did not, by mere judgment of law, amount to a warranty, the question whether they amounted to a warranty, was a question of fact, and should have been left to the jury, but was, in effect, taken away from them by the charge. Representations may amount to a warranty, although not false and fraudulent.—Coolidge v. Bingham, 1 Metcalf 252, and cases cited *supra*.

J. BUFORD, *contra*, contended, that the charge, properly construed, amounted to this: that breach of warranty, and not fraud, was the gist of the action in this case, which was *assumpsit*; that the charge, thus construed, was correct; and that contemporaneous representations are not, *per se*, a warranty. He cited Bradford v. Bush, 10 Ala. 386; Williams v. Cannon, 9 *ib.* 348; 4 *ib.* 700; Sedgwick on Damages, pp. 36 to 43; Hillman v. Wilcox, 30 Maine 171.

GOLDTHWAITE, J.—We think it probable, that the court below intended nothing more, than to convey to the jury this idea; that, in the case before them, the right of the plaintiff to recover must depend upon the warranty and its breach, and not on any deceit which may have been practiced by the defendant in the sale of the slave; but the language of the charge will not bear this construction. The jury are told, that, although they may look to the false representations, in connection with the evidence, to ascertain the warranty, its breach and the damages, they can be used for these purposes only, and cannot be looked to "as a ground of recovery." The last portion of the charge contradicts the first, and asserts the proposition, that these declarations, although they may have amounted to a warranty, would not constitute, in the present action, one of the grounds to rest a recovery upon. The authorities cited by the counsel for the appellant, clearly show that this was erroneous.

Judgment reversed, and cause remanded.

SUMMERLIN *vs.* DOWDLE.

1. When the defendant's attorney withdraws his appearance at the judgment term, "and defendant makes no further defence;" *nil dicit* is the proper judgment.
2. After judgment by *nil dicit*, the defendant cannot take advantage on error of a variance between the writ and declaration.

ERROR to the Circuit Court of Tallapoosa.

Tried before the Hon. EZEKIEL PICKENS.

JAMES DOWDLE, for the use of Alexander McDade, brought an action of debt against Michael J. Summerlin, and, after service of the *capias*, declared against him in his own name and right; and after one continuance by the plaintiff, judgment by *nil dicit* was rendered against the defendant. It is now assigned for error, first, that there is a fatal variance between the writ, declaration and judgment; second, that there is no declaration; third, that the court erred in the judgment rendered.

RICHARDS & FALKNER, for plaintiff in error.

BELSER & HARRIS, *contra*.

LIGON, J.—The judgment entry in the court below, as it was corrected on the motion to enter judgment *nunc pro tunc*, shows that the defendant in that court appeared by his attorney, and at the term at which the judgment was rendered that attorney withdrew his appearance when the case was called, and the "defendant made no further defence." This was at the second term after the return of the writ, and consequently long after the declaration must have been filed under the rules of practice in the Circuit Courts of this State. Under these circumstances, *nil dicit* was the proper judgment, and such, in effect, is the judgment in this record.

The variance between the writ and declaration is only available on plea in abatement, and the latter might have been amended by reference to the former. As the judgment is one of *nil dicit*, and not by default, the plaintiff in error cannot be allowed to

take advantage of such variance on error, in this court. After judgment by *nil dicit*, all defects in the writ and declaration which could have been amended in the court below, are cured by our statute of jeofails.—Clay's Digest 321 § 50; Turner v. Brown, 9 Ala. 866.

As all the assignments of error rest on the same foundation, it is only necessary to add that the judgment of the court below is affirmed.

WHEAT *vs.* WHEAT'S EXECUTORS.

1. A testator bequeathed his slaves to his widow and five living children, with specific directions as to their partition, and died intestate as to the residue of his personal property and all of his real estate; the seventh clause of his will provided, that, if a certain child of a deceased son should arrive at the age of twenty-one years, then the testator's widow and children should make, with what his guardian had paid him, an equivalent to their own shares at the time of division;' and the eight clause directed, 'that all of his heirs who had received advancements should render in the amount, in valuation, at the time of the division, to be considered so much of their shares of the estate:' *Held*, that the testator's said grand-son, whose father had received an advancement, was entitled to a distributive share of the real and personal estate unbequeathed, on his accounting for the advancement to his father, and that the legatees of the slaves were bound to contribute from their legacies, on his arrival at the age of twenty-one years, so much as would make his entire estate equal to their respective portions.

APPEAL from the Court of Probate of Chambers.

THE questions presented in this case arose on the final settlement of the estate of Moses Wheat, deceased, whose will contained the following provisions: By the third clause, he directs certain negroes, specified by name, to be divided into six lots, and the lots to be appraised by three freeholders; the next clause directs that the widow shall have her choice of these lots, and that the remaining five shall be divided by lot among the testator's five living children; the next clause provides, that the residue of his negroes shall be appraised at the same time,

and by the same appraisers, "and that the appraisers shall add all of the said negroes to the six lots above named, so as to make each as nigh equal as possible," in order that his widow and each one of his children may have an equal share. The other clauses of the will are as follows:

"Sixth. It is my will and desire, that enough of the south-west corner of section 17 be run off so as to take the barn, and for the same to be added to section 18; and twenty acres from section 18 to be added to section 17; the line to commence at the half-mile stake between 17 and 18, and run west until it strikes the branch, and then up the branch far enough to include twenty acres.

"Seventh. It is further my will and desire, that if Francis H. Wheat, my grand-son, should arrive at the age of twenty-one years, my beloved wife, Artimesia Wheat, and my said children, do make, with what the guardian pays him, or may have paid him, on his arrival at twenty-one years of age, an equivalent to their own shares in valuation at the time of the division.

"Eighth. It is also my will, that all of my heirs that has had property from me shall render in the amount, in valuation, at the division of my property, and shall be considered as so much of their shares or part of the estate."

It was admitted, on the final settlement, that said Francis H. Wheat, the testator's grand-son, was entitled to a distributive portion of one sixth of the estate, unless he is excluded by the aforesaid will; that the widow had dissented from the will, and had received one fifth of all the personal property of the estate and her dower interest in the lands; that there was in the hands of the executors, subject to distribution, the sum of $9250 23, which was derived from the sale of the personal property other than the negroes disposed of by the will; that the testator died intestate as to his real estate, and that his lands had been sold by the executors for the purpose of distribution; that there is in the hands of said executors, subject to distribution, the sum of $7321 68, derived from the sale of said lands; that the father of said Francis H. Wheat, who was a son of said testator, had received in his life-time, from said testator, the sum of $1200 as an advancement; that said testator became the guardian of said Francis, on the death of his

father, and so continued until his death; that the estate of said Francis, in the hands of his guardian, amounted to the sum of $5,868; that the negroes conveyed by said will, according to the valuation, were worth $29,300, and each legatee's portion, after deducting the widow's fifth, was, at the time of distribution, $4,688.

Upon this state of facts, the court refused to allow said Francis H. Wheat any portion whatever of the said sums in the hands of the executors for distribution, derived from the sale of the real estate and personal property other than negroes, as above stated; to which decision of the court the said Francis, by his guardian *ad litem*, excepted, and he how assigns it for error.

M. Andrews, for plaintiff in error.

P. M. Allison, *contra*.

PHELAN, J.—We are of opinion, that the testator, Moses Wheat, did not devise nor intend to devise, his lands, and, furthermore, that he did not bequeath any portion of his personal property except his slaves.

We come to this conclusion in part for the following reasons: although the testator made a very special and full bequest of his slaves, and although it appears that he had at that time a large amount of personal property other than his slaves (about 18,000 worth), and also lands of considerable value (over $7000 worth), he made no express provision in his will in regard to either, except an unimportant one about taking a few acres from one section and adding them to another. That he did not intend to devise his lands, is further shown by the fact that his will is attested by only two witnesses, when the statute requires three to pass lands.

Again; in clause seven of this will he says: "It is also my will, that all my heirs that has had property from me, shall render in the amount in valuation at the division of my property, and shall be considered as so much of their shares or part of the estate." This clause evidently contemplates a division of his property; that is, of his whole property or estate, and not the particular division of the slaves as directed in the third, fourth and fifth clauses. It further contemplates a division

among his heirs—that is, heirs at law in its proper legal sense—and not his children then living only, to whom the slaves had been bequeathed under a certain trust or condition. His grand-son, as the only surviving child of his father, the testator's son, was a regular heir at law presumptive of his grand-father; and, besides, the proof shows, that his father, the testator's son, had received an advancement of about $1200 from the testator. In view of these facts, it can hardly be supposed, that the testator intended to confine the use of the word heirs to his children then living exclusively.

If we have given the true construction to this will, it follows, of course, that as to his lands, and all his personal property except his slaves, Moses Wheat died intestate. Under this construction, there can be but little difficulty in determining the rights of the several parties under the law and this will taken together.

The widow, having dissented from the will, is, of course, entitled to her dower in the lands, and her regular distributive share, which, in this case, would be one fifth of all the personal property after the payment of debts, as there were more than four children.—Clay's Dig. 173 § 4.

The negroes which would remain after deducting her fifth part, would have to be divided into five shares, as nearly conformable to the directions of the will as possible, among his five living sons and daughters named in the fourth clause of the will, and these slaves they would hold respectively subject to the trust in favor of his grand-son, Francis H. Wheat, created by the seventh clause; that is, as we construe it, under an obligation to contribute respectively so much as would, in the aggregate, make his estate or property in the hands of his guardian, when he arrived at the age of twenty-one years, equal in valuation to their respective shares of his estate at the time of the division of said estate; if, or on condition that he (Francis H.) arrived at the age of twenty-one. We may say, in few words, that this will left the land, and all the personal property except the slaves, to be divided and distributed according to the law of descent and distribution; and as to the slaves, they were bequeathed to the sons and daughters of the testator then living, but on the express trust and condition, that, if his grand-son attained the age of twenty-one, and if his estate or property

did not then in the whole amount to as much as they respectively received as a share of his estate under his will, or otherwise, at the time of the division of said estate, then they were respectively bound to contribute so much as, taken in the aggregate, would make his estate or property equal in value to a share at the time of the division.

The decree of the Probate Court, which excluded Francis H. Wheat from any portion of the proceeds of the sale of the land, or the proceeds of the personal property other than the slaves specially bequeathed as aforesaid, was erroneous.

The advancement to his father in his life-time, made by the testator, should be deducted from his share, or one sixth part of the proceeds of the land and other personal property, (omitting the slaves,) and a decree rendered in his favor against the executors for the balance, and the decrees in behalf of the others should be modified accordingly.

It has been argued, that he should not be required to bring the advancement made to his father into hotchpot, upon some supposed intention of the testator to put his grand-son on a perfect equality with his own children. We cannot discover such intention, and the clause requiring his heirs who recovered advancements to "render them in at the division of his property," is express and plain.

For the error aforesaid, the decree of the Probate Court is reversed, and the cause is remanded, that said court may proceed in conformity with the views expressed in this opinion.

MELTON *vs.* WATKINS.

1. Where plaintiff claims under an absolute conveyance in fee from defendant, parol evidence of a contemporaneous verbal agreement for the retention of possession by the defendant until he had made another crop on the land, varies the legal effect of the deed, and is therefore inadmissible.

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. GEO. D. SHORTRIDGE.

TRESPASS QUARE CLAUSUM FREGIT by John Melton against Evan Watkins, to try titles to a certain tract of land, and to recover damages for its detention. The defendant pleaded not guilty, with leave to give any special matter in evidence.

On the trial, the plaintiff introduced in evidence a deed for the land, from the defendant, conveying the same to him absolutely in fee simple, and dated the 18th of December, 1850; and then proved that defendant was in possession of said land at the commencement of this suit, and remained in possession thereof until the fall of the year 1851; also, the value of the rents and amount of damages during the time defendant had possession. "The defendant then offered to prove, by the subscribing witness to said deed, that, at the time said deed was executed, when defendant was about to sign the same, and immediately before he did sign the same, he and plaintiff made a verbal contract, that defendant was to have the possession of said land to the end of the ensuing crop year; to the introduction of which evidence plaintiff objected, on the ground that it varied the terms of the written contract as expressed in said deed.—The court overruled the objection, and plaintiff excepted. Proof was then made, tending to show a contract that defendant was to retain the possession of the land, either during the balance of the year 1850, or during the ensuing crop year; but no proof was made of any contract subsequent to the signing of the deed.

"Upon this state of facts, the court charged the jury, that said deed, from defendant to plaintiff, *prima facie* entitled the plaintiff to the possession of the land embraced in it, as soon as it was executed; but, if they found from the evidence that there was a parol contract, made by plaintiff and defendant, contemporaneous with the execution of the deed by the defendant, by which defendant was to retain possession of the land to make another crop, and if defendant abandoned possession of said land at the expiration of that time, then they must find for the defendant; to which charge the plaintiff excepted."

The admission of the parol evidence, and the charge of the court, are now assigned for error.

B. T. POPE, for the appellant:

A prior or contemporaneous agreement, inconsistent with the legal effect of a deed or conveyance, is void.—Litchfield v. Fal-

coner, 2 Ala. 280; West & West v. Kelly's Ex'rs, 19 Ala. 354; Walker v. Clay & Clay, 21 Ala. 797.

By the statute of uses, the possession of the vendor of land is transferred to the vendee, and becomes his possession, *eo instanti* with the execution of the deed.—Bliss v. Smith, 1 Ala. 273.

If the terms of a deed are clear, the meaning of the parties must be ascertained by reference to it. The right to the immediate possession, was as much a term of the deed, as the title itself.—McCutchen v. McCutchen, 9 Porter 650; Lamar v. Winter, 13 Ala. 31; Dunn and Wife v. Bank of Mobile, 2 Ala. 152; 8 Ala. 349; 2 Porter 29; 4 S. &. P. 96; 2 U. S. Digest, p. 49, § § 559, 560; *ib.* 57, § § 750 to 753.

G. C. Ellis, and Morgan & Walker, *contra*:

The admission of the parol evidence was not error: it does not contradict the deed in any particular. The deed conveys the legal title in the land to the grantee; but the title may well be in him, while the possession and right of possession remain with the grantor. Defendant's possession would not be inconsistent or incompatible with the plaintiff's right of property.—1 Black. Com. pp. 157 to 160.

Parol evidence is admissible to show that a conveyance absolute on its face was intended to operate only as a mortgage or security.—Hudson v. Isbell, 5 S. & P. 67.

A parol agreement, made contemporaneously with a written one, may be established by parol evidence, and maintained, if it does not form a constituent part of the written contract, and does not alter or contradict it.—Garrow v. Carpenter, 1 Porter 359; Mills v. Geron, 22 Ala. 669.

CHILTON, C. J.—Melton, in the court below, relied upon the absolute conveyance in fee, executed to him for a tract of land by Watkins, the legal effect of which was to transfer the entire interest, of every kind, which Watkins then had in the land, both as respects the title and the right of enjoyment in possession. The court, however, by its charge, gave effect to a contemporaneous parol agreement, that the possession of the land should be retained for a time by the grantor, no such revocation appearing in the deed, or otherwise in writing.

This was erroneous. It varied by parol the legal effect of the deed, and took from the grantee an interest which the deed conveyed to him. The rule is too well settled to require the citation of authority, that all previous or contemporaneous parol agreements, or understandings, between the parties, materially altering or varying, by adding to, or subtracting from, the written agreement, must be considered as merged in that agreement, and the writing must be regarded as the evidence and sole expositor of the contract of the parties, when it is clear and unambiguous.—Gordon v. Phillips, 13 Ala. 567, and cases cited on the brief of counsel.

This view does not conflict with Garrow v. Carpenter *et al.*, 1 Por. 359; for, in that case, the agreement proved by parol, and which was contemporaneous with the writing, did not go to alter, contradict or explain the writing. at all events, such was the judgment of the court. Nor does it fall within the rule, which allows absolute deeds to be shown by parol to have been intended as mortgages merely. It simply presents the case of a conveyance of an entire interest in land, without reservation of the possession, which the law, in virtue of such conveyance, transfers to the grantee, and an attempt to reserve a term to the grantor notwithstanding the deed, and in palpable violation of its legal effect, by a parol contemporaneous agreement.

As we have said on a former occasion, there is no hardship in requiring parties to make their writing, which they adopt as the evidence of their agreement, speak truly its terms. Were we to depart from this evidence, and to go out in search of parol negotiations, either at or before the time the parties reduced their contract to writing, we should open a wide door for fraud and perjury, and would introduce the greatest uncertainty, in many cases, as to what the contract of the parties really was. The policy of the law is clearly opposed to relaxing the stringency of the rule.—See Seay v. Marks, 23 Ala. R.

Let the judgment be reversed, and the cause remanded.

DAVIS *vs.* CALHOUN.

1. Three several judgments rendered by a justice of the peace, in cases between different parties, cannot be removed to the Circuit Court by one writ of *certiorari*, sued out by a party who was a defendant in each case.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. NAT. COOK.

THREE judgments were rendered by a justice of the peace, in one of which Wilburn Whittington, for the use of Jesse Calhoun, was plaintiff, and Jeremiah S. Davis was defendant; in another, Jesse Calhoun was plaintiff, and Jeremiah S. Davis and William S. Davis were defendants; and in the third, Jesse Calhoun was plaintiff, and Jeremiah S. Davis was defendant. After the rendition of these judgments, said Jeremiah S. Davis removed the three cases to the Circuit Court by *certiorari*, suing out but one writ, and giving but one bond. In the Circuit Court, said Calhoun moved to dismiss the *certiorari*, for irregularities appearing in the record, and his motion was sustained; and this judgment is now assigned for error.

J. J. WOODWARD, for plaintiff in error.

WHITE & PARSONS, *contra*.

LIGON, J.—The opinion of this court in the case of Mc Clellan v. Allison, 19 Ala. 671, to which we are referred by the counsel of the plaintiff in error, does not affect the present; nor are the radical errors in the proceedings in this case covered by the very liberal decision in the cases of Cooper v. Madden, 6 Ala. 431, and Wetumpka & Coosa R. R. Co. v. Bingham, 5 *ib.* 657. In all those cases, the irregularity complained of was confined to the bond, or the action of the appellate court in making orders in the case. Here, the defect extends to the petition for *certiorari*, and to the writ itself.

Not only are three cases sought to be brought up by one petition, bond and writ, but the parties to the record are not the same in any two of them. Different rights and different interests are involved in each case, and the appellate court could not rightfully have consolidated them, and rendered one judgment as to all. When this is the case, it is fatally irregular to issue but one writ, and take but one bond.—Such was the ruling of the court below, and its judgment is affirmed.

PERRYMAN *vs.* CAMP.

1. When a transcript is filed at a term subsequent to that to which the appeal was taken, the appeal will be dismissed on motion of the appellee, and the appellant may sue out another appeal at any time before the affirmance of the judgment; but the appellee cannot have a dismissal of the appeal and an affirmance of the judgment at the same time, and on the same transcript.

APPEAL from the Circuit Court of Randolph.
Tried before the Hon. ROBERT DOUGHERTY.

MOTION to dismiss the appeal and affirm the judgment.

BELSER & RICE, for the motion.
RICHARDS & FALKNER, *contra.*

GOLDTHWAITE, J.—In this case, an appeal was taken to the last term of this court, and no transcript was filed until the present term. A motion is made, after filing the transcript at this term, to dismiss the appeal, and also for an affirmance of the judgment. The first motion must be allowed, as the law requires the transcript to be filed at the term to which the appeal was taken, and if this is not done, it is discontinued. The fact that the bill of exceptions was in the possession of the appellant's counsel, and that the

transcript was not made out for that cause, does not avoid the effect which the law attaches to the failure to file the transcript at the proper term; and the only remedy is, to sue out another appeal, which, under the practice established by this court in the case of The United States v. Haden, 5 Port. 533, and Roebuck v. Dupuy, 2 Ala. 352, can be done to any subsequent term, before the judgment is affirmed.—The motion to dismiss must prevail, because of the discontinuance.

But we cannot dismiss and affirm both, for the reason, that the two motives are inconsistent with each other; as the first denies that the case is properly here, while the other recognizes the transcript as being in court as a sufficient predicate for an affirmance. If it is sufficient to affirm upon, we must hold that it is sufficiently here for the purposes of trial.

Appeal dismissed.

BREWER *vs.* THE BRANCH BANK AT MONTGOMERY ET AL.

1. The acceptance of a note may be an extinguishment and payment of a judgment, whether proceeding from a defendant or a stranger.
2. The statutory remedy by motion to supersede an execution on a judgment, does not deprive the Chancery Court of its original jurisdiction to remove a cloud upon the title to land; and therefore a vendee, whose land has been sold under execution (issued on a judgment recovered against his vendor before his purchase), and bought in by himself, may come into equity to enjoin the collection of his bid and all further proceedings under the judgment, upon an allegation that the judgment had been paid and satisfied before the issue of the execution.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Reuben H. Brewer against the appel-

lees, to enjoin proceedings under a judgment at law, which the Branch Bank at Montgomery recovered, in 1842, against Alexander S. Howell, Joseph D. Hopper, and M. Ashurst, on which judgment an execution was issued, and levied on a certain tract of land, which complainant purchased of said Howell in 1845. It alleged, that said Bank, prior to the issue of said execution, had accepted a note made by Robert T. Ashurst, Joseph D. Hopper, and Moses McLemore, in full payment and extinguishment of said judgment, which was thereby paid and extinguished; that complainant, being ignorant of this fact, bought in said land at the sheriff's sale, being the highest bidder. The prayer of the bill is, that the Bank may be restrained from collecting the amount of complainant's bid, and perpetually enjoined from all further proceedings under said judgment to subject said land to its satisfaction.

The Chancellor dismissed the bill for want of equity, holding that the acceptance of a note from a person who was no party to the judgment, was no satisfaction of that judgment; and his decree is now assigned for error.

HILLIARD & THORINGTON, for appellant.

N. HARRIS, *contra.*

CHILTON, C, J.—The decree of the Chancellor in this case cannot be sustained. The bill was dismissed for want of equity; and its allegations, for the purpose of such a motion, must be regarded as true. One of these allegations is, that the judgment, which *prima facie* constitutes a lien and incumbrance on this land, has been *paid* and *extinguished*, by accepting a note made by R. T. Ashurst, J. D. Hopper, and Moses McLemore; that said note was accepted by the Bank in payment and extinguishment of said judgment, and by its being so accepted, the said judgment became, and was thereby, paid and extinguished, That the acceptance of a note may be an extinguishment and payment of a prior debt or liability, is well settled (see Abercrombie v. Mosely, 9 Port. 150); and that it makes no difference whether such payment proceeds from a party to the transaction or a stranger, was decided in McLane v. Miller, 10 Ala. 856. If, therefore, the allegation

as to the extinguishment and payment of the judgment be true, we are of opinion the bill does contain equity.—1 How. Miss. 139; 5 Missouri 59; 2 Shep. 202; 1 Rich. Rep. 111.

The other objections taken to the jurisdiction, viz., that the complainant had a remedy at law, and no attempt had been made to enforce the bid which he had made when the land was sold, we do not think can be supported. The facts charged in the bill show, that there is a cloud resting on complainant's title, which he has a right to have removed, if those facts be as stated. The remedy given by statute, does not deprive the Chancery Court of its original jurisdiction in such cases.

Let the decree be reversed, and the cause remanded.

POWELL *vs.* THE CENTRAL PLANK ROAD CO.

1. The appeals spoken of in sections 3019 and 3020 of the Code, are appeals from final judgments or decrees, and not from those which are interlocutory only.
2. The register has power, under the Code, to grant an appeal from an interlocutory order of the chancellor dissolving an injunction in vacation (Ligon J., *dissenting*).
3. A mail-contractor cannot come in equity to enforce a contract with a plank-road company for the transportation of the mail over its road, unless he shows by his bill that a court of law could not compensate him in damages for the breach of the contract.

APPEAL from the Chancery Court of Coosa.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by the appellant, James R. Powell, against the Central Plank Road Company. It alleges, that complainant was a mail-contractor with the United States for the transportation of the mail on the route from Montgomery to Guntersville; that as such contractor he made a contract with the said company, acting through its agent, for the transportation

of the mail over its road, at a stipulated price, from June, 1852' until July, 1854; that said defendant, in violation of its said contract, has prevented complainant's mail coaches from passing over its road, and still continues to do so, whereby complainant has failed to carry said mails as required to do by his contract with the United States; that his injury will be irreparable if said company is allowed thus to violate its contracts; that his stock and stables, under the faith of said contract, have been removed from the old route to said plank-road, and all his arrangements made to use said road in the transportation of the mail.

The prayer of the bill is for an injunction, which was granted by the Hon. Robert Dougherty. On the coming in of the answer, a motion was made before the chancellor, in vacation, to dissolve the injunction; which motion was sustained, solely on the ground of a want of equity in the bill. No application was made to the chancellor for an appeal, and for an order retaining the injunction during its pendency; but the complainant applied to the register for an appeal, which was granted on the 9th of January, 1854, returnable to the June term of the Supreme Court; and bond was executed as required by the statute. The appellant filed a transcript of the record in the Supreme Court, on the 13th of February, 1854; and on this transcript he now moves the court for a special injunction until his appeal can be heard and determined, if the court should be of opinion that the execution of the appeal bond, of itself, does not restore and retain the injunction pending the appeal.

Belser, Rice & Barrett, and Watts, Judge & Jackson, for appellant, contended, that, inasmuch as the agent of the company had contracted within the sphere of his agency, and the company was not bound at law by the form of the contract, a court of equity, *ex æquo et bono*, would enforce it against the principal (Story on Agency, p. 209, § 162); that this is not the case of a common or ordinary injunction, but is the point in the cause: it is to prevent irreparable injury; to dissolve the injunction, decides the cause (Purnell v. Daniel, 8 Iredell's Eq. R. 9; McBrayer v. Hardin, 7 *ib.* 1).

White & Parsons, and Elmore & Yancey, *contra.*

LIGON, J.—The counsel for the appellant insists, that the execution of the appeal bond in this case, *per se*, restores the injunction which had been dissolved by the chancellor; and to sustain his position, he relies upon section 3020 of the Code, which is in these words: "When the decree rendered is for the performance of any other act than the payment of money, (except in cases otherwise provided in this code,) the party wishing to supersede the execution of such decree must apply to the chancellor or register, either in term time or vacation, who must direct the amount and condition of the appeal bond." It is insisted, that this section, taken in connection with section 3019, which provides that, "The appeal does not operate as a supersedeas of the judgment, unless bond be given by the appellant, in double the amount of the judgment, payable to the appellee, with sufficient sureties, and with condition to prosecute the appeal to effect, and satisfy such judgment as the Supreme Court may render in the premises," shows conclusively, that the bond for the appeal, executed in this case, must have the effect of superseding the interlocutory decree of the chancellor, and thus restore the injunction dissolved by him.

Such a construction would scarcely be allowable, even if it were proper to consider these sections apart from those which precede them in the same chapter; but, when taken in connection with sections 3016 and 3018, not a doubt can exist, that the appeals spoken of in sections 3019 and 3020 are appeals from final judgments and decrees, and not from those which are interlocutory only. In this we all concur.

But a question is made, as to the power of the register to grant an appeal from an interlocutory order of the chancellor, dissolving an injunction in vacation. The majority of the court hold, that such a practice is allowable under the Code, inasmuch as, by its provisions, the appeal is a matter of right, and is made to perform the office of both a writ of error and an appeal under our former practice; and, as power is now conferred on the register to grant appeals on decrees final, and as he has authority to make all interlocutory orders except those of granting and dissolving injunctions, and appointing receivers, he has also the power, by implication, to grant appeals from interlocutory orders dissolving injunctions, as provided for by section

2984 of the Code; and consequently the former practice of this court, in respect to such appeals, no longer prevails.

I have been unable to bring my mind to this conclusion, and this for reasons which I will now proceed to state. Under our practice, as it existed before the adoption of the Code, an appeal could only be taken before the chancellor; but when applied for, it was granted to the party as a matter of right. The codifiers must be presumed to have known this practice, and doubtless were familiar with it. These appeals were allowed by statute, both from final decrees and interlocutory decrees dissolving injunctions. The Code changes this practice, so far as final decrees are concerned, by authorizing the register to grant the appeal, but no further. In cases like the present, no writ of error will lie, or ever has been allowed. The register, therefore, under his former power to grant writs of error, for which an appeal is now substituted, can claim no right to grant appeals in such cases; and where his power over appeals, as conferred on him by the Code, is adverted to, we find it limited to cases in which final decrees have been rendered, and to these only. The argument to sustain his power in the present case, derived from his power under the Code to grant appeals from *final* decrees, fails to establish it.

I will now examine his power to grant this appeal under the first division of section 621, which confers on him the power "to make all interlocutory orders and decrees between the parties, not affecting the decision of the controversy." It may be here remarked, that this grant of power is not peculiar to the Code. Under the former law, he possessed the same power, conferred almost in the same words (Clay's Digest 349 § 20); yet no person ever supposed, that this section was designed to confer on him authority to make orders by which the cause was to be transferred from one court to another; indeed, this power has ever been understood to refer alone to such orders as are necessary to speed the cause in the court below. Both in the Code and in the old law, it is provided, in the same clause which gives the power to make interlocutory orders and decrees, that such orders "shall be subject at all times to the control, direction and supervision of the chancellor;" and I do not suppose that his power to grant appeals, in those cases in which it is given him, was ever intended to be reviewed, directed, super-

vised, or controlled by the chancellor. My conclusion is, that the appeal authorized to be taken in section 2984 of the Code, should be applied for, and obtained now, as it was under the old law (Clay's Dig. 357 § 80); of which, the provision on this subject in the Code is, substantially, and in every material part literally, a copy. As to the officer who shall grant such appeals, the Code, like the former statute, is silent. We are, then, left to establish a practice for ourselves, and I am satisfied with that laid down in Griffin v. The Branch Bank of Huntsville, 9 Ala. 201, which requires such appeals to be taken before the chancellor. My opinion is, that the record in this case is not properly in this court, and that we have, as yet, no jurisdiction over the case; and for this reason, the motion to reinstate the injunction, or to grant a temporary one pending the appeal, should be repudiated. But as my brethren are of a different opinion, I will proceed to consider the merits of that motion.

The chancellor was of opinion, that the bill and amended bill did not make out a case for relief in a court of equity, and on this ground dissolved the injunction. We concur with him, that upon these bills the jurisdiction of the Court of Chancery cannot be supported. It is here contended, that the bill shows a case of irreparable injury to the plaintiff, unless the Court of Chancery will interfere to prevent it. We do not think the allegations sufficient for that purpose. It sets out a contract between the complainant and the defendant, made with the agent of the latter, by which the former acquires the right, as mail-contractor on the route from Montgomery to Guntersville, to transport the mails in four horse post coaches or omnibuses, over the Central Plank Road, and shows a violation of that contract on the part of the defendant, resulting in injury and inconvenience to the complainant. But we cannot see from the bill, that a court of law, if appealed to, could not furnish ample relief. There is nothing in the bill to negative the idea that the complainant's contract with the United States to carry the mail on the route designated, could not be executed by the use of the dirt road over which the mail had formerly been transported; nor does it appear that there is imminent danger, that the breach of the contract on the part of the defendant will inevitably result in repeated and heavy amercements on the complain-

ant for failing to carry the mails according to his contract with the United States Government, or necessarily cause a forfeiture of that contract. All the injuries complained of may be readily estimated by a jury, and damages, commensurate with them, may be given in the courts of law. We apprehend, no case can be found in which a court of chancery has taken jurisdiction for the purpose of enforcing a contract of this character, when it is clear that a court of law could amply compensate the injured party, in damages, for the breach.

The bill shows an agreement between the parties, perfect in all its parts—requiring no reformation in order to make it speak their intention: it is not defective in form, and expresses all the terms agreed upon. The bill does not allege the insolvency of the defendant, nor show any injury resulting from the breach which could not be compensated in damages, and consequently makes out no case for the interposition of a court of equity. We think, therefore, that the motion for a temporary injunction, pending the appeal, must be denied.

WARE ET AL. *vs.* COWLES.

1. An act or admission, to conclude a party from afterwards asserting a right, must be plainly inconsistent with that right, and must have been acted on by the other party; if it is susceptible of two constructions, one of which is consistent with that right, it forms no estoppel.
2. The rule as to contradicting or varying a written instrument by parol proof, obtains with the same force in equity as at law. Therefore, where a written contract recited that the purchase money was to be paid on a specified day, and that the vendor was to make titles when the purchase money was settled with him, and no fraud or mistake in its execution was alleged, it was held, that the terms of the contract could not be varied, in equity, by proof of a contemporaneous parol agreement that the purchase money was not to be paid on the day specified, but was to await a settlement of accounts between the parties.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

This bill was filed by the appellants, Robert J. Ware, Arnold Seales and Moses Jones, against Thomas M. Cowles, for a specific execution of a contract and an injunction against an action at law. It alleges, substantially, that said Cowles, in the fall of 1849, by verbal contract, sold certain lands to said Ware, for $1250, one half payable on the first of January, 1850, and the other half on the first of January, 1851; that in April, 1850, said Ware sold said lands to complainant Seales, and gave him a bond for titles, but before doing so he informed said Seales that he had purchased it of Cowles under a verbal contract, and that he would not sell it to him unless Cowles recognized said verbal contract; that thereupon Ware and Seales called on Cowles, "to know whether he had made said verbal contract, and whether he recognized the same, and whether he was then willing that said Ware should sell said lands to said Seales"; that said Cowles replied "that he considered said verbal contract a binding one, and agreed that said Ware might sell said lands to said Seales, and that he would look to said Ware for the said purchase money"; that in June, 1850, said verbal contract between Ware and Cowles was reduced to writing, a true copy of which writing is appended to the bill as an exhibit, and is alleged to be, "in terms and language, a reiteration on paper of said verbal contract"; that said Seales went into possession of said lands under his said purchase, and afterwards sold them to said Moses Jones, and executed to him a bond for titles; that said Jones took possession under his purchase, and has erected permanent and valuable improvements on said lands, "on the faith of said purchase by said Ware from said Cowles, and by said Seales from said Ware, and by said Jones from said Seales, and on the acquiescence of the said Cowles in his said sale to Ware, and on his consent that said Ware should sell said lands to said Seales"; that payments on their purchases have been made both by Seales and Jones; that said Cowles, at the time said verbal contract between him and Ware was entered into, and when it was reduced to writing, was indebted to Ware in a much larger sum than the amount of the purchase money agreed to be paid by Ware for said lands, and that it was then agreed between them that the payment of the purchase money should await a settlement of their accounts; that Ware repeatedly applied to Cowles for a settlement of their

accounts, which Cowles refused to make, and that Ware has now instituted suits in the Circuit and Chancery Courts to compel a settlement; that Ware has never demanded titles of Cowles, because, as he conceived, he had no right to do so until a settlement of their accounts had been made; that Cowles has commenced an action at law against Jones, to recover the possession and try the titles of said lands.

The prayer of the bill is, that Cowles be decreed to execute titles to said lands, and that he be perpetually enjoined from the further prosecution of said action at law. The contract between Cowles and Ware, as reduced to writing in June, 1850, and exhibited with the bill, is as follows:

"I have sold to Robert J. Ware the east half of section thirteen (13), township fourteen (14), and range twenty-four (24), in Macon County, for twelve hundred and fifty dollars ($1250); one half to have been paid 1st January, 1850, and the remaining half in January, 1851; and for which I am to execute to him a warrantee title when the above amount has been settled with me. June 3, 1850. THOMAS M. COWLES."

The Chancellor dismissed the bill, for want of equity, without prejudice to Jones's right of filing a bill against Cowles for his improvements; and this decree is now assigned for error.

BELSER & RICE, for appellants, contended, that the allegations of the bill made out a clear case of estoppel against Cowles, and showed that he ought to be enjoined from prosecuting his action at law (Stone v. Brittain, 22 Ala. 543; Burns v. Taylor, 23 *ib.* 255; Matthews v. Bliss, 22 Pick. 48); that the terms "settled with me," used in the written contract, do not mean a payment in money, but "accounted with me on settlement" (Wellborn v. Sheppard, 5 Ala. 674); that the writing is susceptible of two meanings, if this is not its proper construction, and therefore parol evidence is admissible to show in what sense the words were used (Hogan v. Reynolds, 8 Ala. 68); that complainants do not rely upon any parol contemporaneous agreement, but upon Cowles's subsequent acts and conduct, which waives and destroys his vendor's lien on the land (Young v. Wood, 11 B. Mon. 128; Houston v. Stanton, 11 Ala. 422; Burns v. Taylor, 23 Ala. 255; Wallis v. Long, 16 *ib.* 738;

Wentz v. Dehaven, 1 Serg. & R. 312; Pinkard v. Ingersoll, 11 Ala. 17).

N. W. Cocke, *contra.*

GOLDTHWAITE, J.—The first question presented upon the record is, whether, upon the case made by the bill, Cowles was estopped from asserting his title against Seales and Jones. It is clear, both upon principle and authority, that the conduct or admission which concludes a party must be plainly inconsistent with the right which he afterwards sets up.—Pickard v. Sears, 6 Adol. & El. 469; Co. Litt. 352. If the act or admission be susceptible of two constructions, one of which is consistent with the right, the party would not be concluded from its assertion, because to do so might operate to defeat a man's rights by argument or inference, which is not allowable (Co. Litt. 352 b). So, too, the admission, however unequivocal it may be, will not operate as an estoppel, unless the other party has acted upon it.—Heane v. Rogers, 9 B. & C. 577; Wallis v. Truesdell, 6 Pick. 445.

In the case before us, it appears that the only object of the parties, in calling upon Cowles, was to ascertain if he would recognize the verbal sale which he had previously made to Ware. This he did, and consented that Ware might sell the land to Seales, and that he would look to the former for the purchase money. Taking all the facts in connection with each other, we are by no means certain that Cowles intended any thing more than that Ware might sell the land in the same manner as he might have done had the agreement been in writing. The bill admits, that the verbal contract was the same as the written one subsequently entered into; and that being the case, by its terms, the titles were not to be made until the purchase money had been settled; and it would be unreasonable to suppose that Cowles, in giving his consent to Ware to sell, intended to change the agreement in one of its substantial terms. This consent might as well refer to the transfer of the equitable title, which Ware would have had if the agreement had been put in writing; and to carry it further would be to create an estoppel by inference. We say nothing as to the discharge of the lien upon the land, because we do not consider that ques-

tion presented upon the record, as it is not charged that Seales was influenced in his action, as to the buying of the land, by the conduct of Cowles in agreeing to look to Ware for the purchase money.

If we could allow the written agreement, made between Ware and Cowles, to be varied by parol proof, then it is very clear that the complainants, if not entitled to a specific performance, would have been at least entitled to an injunction until the settlement of accounts between Ware and Cowles; but the rule as to contradicting or varying a written instrument by parol evidence, obtains with the same force in equity as at law.—Bank of Mount Pleasant v. Sprigg, 14 Peters 201. The agreement is certain upon its face; the bill charges neither fraud nor mistake in its execution; and its terms could not, therefore, be permitted to be changed by proof of a parol contemporaneous agreement, that the purchase money was not to be paid at the time specified in the written contract, but to await a settlement of accounts between the parties. Ware cannot call upon the court to aid him, because he has not complied, nor offered to comply, with the agreement on his part; and his assignees, so far as a specific performance is concerned, stand in no better condition than himself; and Cowles not being concluded by his consent that Ware might sell, the other parties are not entitled to an injunction generally. Jones may have a separate claim for his improvements, and the decree of the Chancellor was without prejudice to the assertion of that claim.

The decree must be affirmed, the appellants paying the costs of this court.

JONES *vs.* GRAHAM.

1. The second section of the act of 1848, "to provide for the appointment of inspectors and physician for the penitentiary," confers upon the lessee and

inspectors jointly the power of appointing the physician; if the lessee fails to appoint within three days after the happening of a vacancy, the inspectors alone may fill the place: but if the lessee makes a nomination within such three days, which is rejected by the inspectors, he has a reasonable time (not exceeding three days) after the rejection, within which to make another nomination; an appointment by the inspectors alone, before the expiration of three days after such rejection, is void, and confers no authority on their appointee.

2. Where the plaintiff's evidence is all set out in his bill of exceptions, and shows that he is not entitled to recover, the judgment in favor of the defendant will not be reversed, on error or appeal, no matter what may have been the rulings of the court below.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. NAT. COOK.

ASSUMPSIT by Nathaniel S. Jones against John G. Graham, who was the lessee of the penitentiary during the years 1848 and 1849, to recover the salary which plaintiff claimed to be due him as physician of the penitentiary during those years. It is unnecessary to notice particularly the several rulings of the court to which the assignments of error relate, as they are not material to an understanding of the opinion.

ELMORE & YANCEY, for appellant.

WHITE & PARSONS, and N. S. GRAHAM, *contra*.

CHILTON, C. J.—By the second section of the act "To provide for the appointment of inspectors and physicians for the penitentiary," approved Feb. 3rd, 1848, "the physician of the penitentiary shall be appointed by the lessee, with the advice and consent of the inspectors; and the inspectors shall have power to remove any physician, at all times, for incompetency, or neglect of his duties as such physician; and when any vacancy occurs in the office of physician, which is not filled by the lessee as herein provided, within three days after the happening of such vacancy, the inspectors shall, on the fourth day, proceed to fill such vacancy."

It appears, that, under the provision above copied, Graham, the defendant, on the 5th day of February, 1848, appointed Dr. A. R. Hutchinson to be the physician to the penitentiary; said Graham then being lessee thereof. The

board of inspectors, then being in session, were advised of said appointment, and adjourned until the 8th of February, at which time the board again met, and by resolution refused to consent to the same.

The board met again on the 12th of February, 1848, and the lessee appointed Dr. T. W. Mason to be the physician; but a majority of the board refused to consent to his appointment, which, it appears from his evidence, was made on the 10th of February, two days before the board rejected it. A majority of the board of inspectors then, viz., on the 12th of February, proceeded to elect the plaintiff, Doctor Jones, as physician for the penitentiary, setting forth in their resolution, that the lessee had failed to make an appointment which met the approval of said board, and that the three days allowed him in which to make such appointment had expired.

The main question to be decided by us is, whether the board of inspectors had the right, on the 12th of February, 1848, upon the rejection of Doctor Mason, who was appointed on the 10th, to proceed and elect a physician, independently of the lessee.

It is quite clear, we think, that the object of the second section of the act above referred to was, to confer upon the lessee and the inspectors, jointly, the power to select the physician for the penitentiary; providing, however, for filling the place by the inspectors alone, if the lessee should fail to appoint within three days after the happening of a vacancy. By failing to make such appointment, the lessee would waive his right to do so after three days had elapsed, and then it might properly be exercised by the inspectors alone.

It is insisted by the counsel for the plaintiff in error, that the act was designed to prevent a struggle between the lessee and inspectors, in relation to the appointment of a physician, which might prove injurious to the sick; but we think this is a partial view of its object, and, if the construction contended for be correct, that the inspectors, by refusing to assent to any appointment made by the lessee within three days from the happening of a vacancy, should thereby possess the power of appointing over his head, it would conduce to bring about the very struggle, at least for three days, which the counsel think it was intended to prevent.

We repeat, the object was to obtain the concurrence of both the lessee and inspectors in making the appointment; and if one was made by the lessee within three days after the office became vacant, the inspectors did not, by his rejection, thereby entitle themselves to act independently of the lessee; but the latter had a reasonable time, after his rejection, not exceeding three days, within which to make another appointment. Indeed, the evidence introduced by the plaintiff, as shown in his bill of exceptions, being copies from the minutes of the proceedings of the board of inspectors in reference to these appointments, furnishes, on the part of said board, a practical concession of the lessee's right to nominate after the expiration of three days from the time the vacancy first occurred; for more than three days elapsed between the period of Hutchinson's rejection and the action of the board on Mason's appointment. The fact that the inspectors did act on the appointment of Mason, aside from his positive proof that he was appointed by Graham on the 10th of February, shows that three days had not intervened between the rejection of the nomination of Doctor Hutchinson and the appointment of Doctor Mason.

Such being our view of the proper construction of this statute, it follows, that as the board of inspectors proceeded immediately, on Mason's rejection, to appoint the plaintiff Jones, thereby affording the lessee no opportunity of making another appointment, and there being no evidence in the record showing that Graham ever recognized his appointment, or called for his services as physician in the penitentiary, his appointment was void, and conferred upon him no authority to act.

This view is decisive of the whole case, as the facts shown by the plaintiff in his bill of exceptions, and which are not controverted, clearly show that he was not entitled to recover, and the court would have been justified in charging the jury, that the proceedings of the board of inspectors, as given in evidence by the plaintiff from their book of entries, show that the plaintiff was not entitled to recover, since his appointment by the inspectors, without the concurrence of the lessee, under the circumstances, was void.

The bill of exceptions sets out all the evidence; and there

was none conducing to show that Jones, the plaintiff, continued to act after his time had expired as penitentiary physician, in virtue of his old appointment. It says, he was the physician of the penitentiary for the two years preceding the 5th day of February, 1848, and had not resigned or been removed, and that upon his election on the 12th of February, 1848, he entered upon the discharge of his duties, and continued to discharge them until the 18th of February, 1848. We repeat, that there is no proof conducing to show that he acted by the request, or with the approbation of the lessee, and consequently no evidence to fix any liability on the lessee to pay for his services, if he rendered any, after the 5th of February, 1848; so that, deriving no right from his appointment, made on the 12th of February, 1848, the plaintiff, by his own showing, is not entitled to recover.—Such being the case, he has sustained no injury from the several supposed errors of which he complains.

The rule is well settled, that when it is obvious, from the proof furnished by the plaintiff himself, that he is not entitled to recover, no matter what may be the ruling of the court in respect to other matters involved in the cause, this court will not reverse a judgment rendered in favor of the defendant.—Turcott v. Hull, 8 Ala. 522; Smith v. Houston, *ib.* 737; Donley v. Camp, 22 *ib.* 659. It is unnecessary, therefore, for us to inquire into the errors which have been assigned as to the exclusion of the evidence and the charge given, &c.

We would observe, that the facts presented by the record now before us, are quite different from those presented when the case was before this court at a previous term, as regards the appointment of Doctor Jones.

There is no error in the record of which the appellant can complain, and the judgment is consequently affirmed.

DAVIS *vs.* CALHOUN.

1. When a cause is removed to the Circuit Court by *certiorari*, it should not there be dismissed on account of a defect in the bond, unless the appellant fails or refuses, when required, to make a good one.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. NAT. COOK.

J. J. WOODWARD, for plaintiff in error.

WHITE & PARSONS, *contra.*

LIGON, J.—This case originated before a justice of the peace, and was removed to the Circuit Court by writ of *certiorari.* The *certiorari* was there dismissed, on motion, "for irregularities". On inspecting the record, we perceive that the condition of the bond for a *certiorari* materially differs from that required by the statute; but the *certiorari* should not have been dismissed for this cause, unless the party in whose favor it issued should fail or refuse, when required to do so, to make a good bond. This record does not show that the court below ever made such a requisition, or gave him any opportunity to make a good bond.—McClellan v. Allison, 19 Ala. 671; Carter v. Pickard, 11 Ala. 673.

Let the judgment be reversed, and the cause remanded.

McNEILL AND FORNISS *vs.* EASLEY, ADM'R.

1. When one makes a demand as agent of another, reasonable evidence of his authority may be required; but if the party fails to do this, and rests his refusal on the ground of right in himself, he cannot afterwards object to his want of knowledge of the agent's authority.
2. If the owner take possession of a hired slave, when there has been no viola-

tion of the contract on the part of the hirer, he loses his right to hire; if he refuses to deliver the slave on demand, the fact that he afterwards sends him away alone, with directions to return to the hirer (which instructions the slave disobeys, and runs away), does not excuse the refusal.

ERROR to the Circuit Court of Marengo.

Tried before the Hon. GEORGE D. SHORTRIDGE.

ASSUMPSIT by Anselm B. Easley, as administrator of George W. Law, deceased, against the defendants in error, on a promissory note, which was proved to have been given for the hire of a slave. The defendants proved by Charles McNeill, who was a son of the defendant to whom the slave was hired, that the slave ran away from his father before the expiration of his term of hire, and witness, who lived in plaintiff's immediate neighborhood, was authorized by his father to bring home said slave if he could find him; that he found the slave at plaintiff's house, and demanded him of plaintiff, who refused to deliver him, saying that he had reason to believe that the slave had been treated with inhumanity, and that he must have an interview with witness' father, or his overseer, before he would surrender the slave. It was also proved that McNeill sent another son to plaintiff a few days afterwards, who told plaintiff that he came as agent of his father, and demanded the slave; that plaintiff said, he had told said slave to return to defendant, and that the slave had left his residence under such instructions. It was also proved that the slave, instead of returning to defendant as directed, ran away. Plaintiff then introduced a witness, who testified, that, on the day before Charles McNeill demanded the slave of plaintiff, witness had the slave in his possession, having captured him as a runaway; that he offered to return the slave to said Charles whilst at plaintiff's gate, and said Charles declined to take him; that witness then left the slave at plaintiff's house, he being absent from home at the time.

"The court charged the jury, among other things, that, if plaintiff was informed of the fact that Charles McNeill had declined to receive said slave, when an offer had been made to surrender him, before he was left at plaintiff's house, he might well doubt the agency of said Charles, and refuse to deliver the slave to him when called upon, if there was no other proof of the agency of said Charles than his own declaration to that effect.

"The court further charged the jury, that, if plaintiff ordered the slave to return to defendant's house, honestly believing that the slave would do so, and that the slave had left his premises accordingly before the second demand was made, that was a sufficient excuse for his not being able to deliver him when called upon the second time."

The defendants below excepted to both these charges, and they now assign the same for error.

WILLIAM M. BROOKS, for plaintiffs in error.

WILLIAM M. BYRD, *contra*.

GOLDTHWAITE, J.—When one makes a demand as agent of another, reasonable evidence of authority may be required; but if the party fails to do this, and rests his refusal on the ground of right in himself, he cannot afterwards object to the want of knowledge on his part of the authority of the agent.—Spence v. Mitchell, 9 Ala. 744; Dowd v. Wadsworth, 2 Dev. Law 123, 135; West v. Tupper, 1 Bail. 193. The first charge was erroneous.

Neither can the second charge be sustained. There is an implied stipulation on the part of every bailee of a slave for hire, that he will treat him with humanity; and if he fails to do so, it is a violation of the bailment on his part. It is equally certain, that if the bailor takes possession of the slave, when there has been no violation of the contract by the other party, he loses his right to hire, upon a familiar principle of the law of contracts.—Perry v. Hewlett, 5 P. 318. The bailee of the slave was entitled to his services for the term, and the bailor was no more entitled to retain him after demand made, than to have taken him into possession before the term of the hire had terminated. Had he returned the slave, and the bailee received him back, the latter would be held to have waived the former breach. This, however, was not done:—a second demand is made; and the bailor sets up as a legitimate excuse for failing to comply with this demand, the fact that he had sent the slave off by himself, with directions to return to the person he had but a few days before ran away from. This was an act, which, under the circumstances, instead of effecting the restoration of the slave to the party entitled to his services, would probably,

as it did in fact, prevent that result. The charge upon this point was erroneous.

The judgment is reversed, and the cause remanded.

SALMONS *vs.* ROUNDTREE.

1. Defendant in execution agreed to pay, in compromise and satisfaction of the judgment against him, a certain sum in money and the costs of a claim suit then pending; but when the suit was called in court the next morning, he refused to pay or to confess judgment for the costs, and denied that he had promised to do so; the suit was not then dismissed, but at a subsequent term a trial was had, which resulted in a verdict for the claimant; plaintiff in execution having paid the costs, and brought suit on the contract, the court charged the jury, "that if defendant, in consideration of plaintiff's entering satisfaction of the judgment, or with a view to benefit the claimant, undertook to pay said costs, and, when the cause was called up, refused to bind himself therefor, the plaintiff was entitled to recover the costs which had accrued up to the time he so refused": *Held*, that there was no error in the charge of which defendant could complain.
2. A party cannot complain of a charge, which, when construed with reference to the evidence, is too favorable to him, or is without injury.
3. When the bill of exceptions sets out all the evidence, an erroneous affirmative charge, which is shown to be abstract, furnishes no ground of reversal.

ERROR to the Circuit Court of Madison.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by Seaborn J. Roundtree against Grove Salmons, for the non-performance of an agreement to the following effect: In consideration of plaintiff's giving a receipt in full satisfaction of a certain judgment which he held against defendant, the latter promised to pay him a certain sum in money, and to pay the costs of a claim suit then pending between plaintiff and one Turner. The pleas were, *non assumpsit*, payment, no consideration, set-off, failure of consideration, and accord and satisfaction. The facts of the case are stated at length in the opinion.

BRICKELL & CABANISS, and ROBINSON & JONES, for plaintiff in error.

C. C. CLAY, Jr., and J. W. CLAY, *contra.*

CHILTON C. J.—Roundtree & Baldwin, having obtained a judgment in the County Court of Madison against Salmons, for $625 43 debt, and $92 69 costs of suit, caused an execution to issue, which was levied on certain property, which was claimed by one Turner, who put in his claim under the statute.

The proof conduced to show, that, while said claim was pending, Salmons went to one Rogers, a witness, and requested him to use his influence with Roundtree, to effect a compromise of his indebtedness to Roundtree, who was then authorized to settle the demand; the witness refused to interfere, unless Salmons would agree to pay the cost of the claim suit, which was then pending for trial in the Circuit Court of Madison, which was in session; Salmons replied, that he was willing to pay the costs; Rogers then went to Roundtree, and advised him to compromise the judgment. Thereupon Roundtree and Salmons had a settlement, but not in the presence of witness; but both parties informed the witness, that Salmons, in satisfaction of the judgment, had agreed to give Roundtree his note for $276 33, due 1st of January, 1848, to pay $300 in cash, to pay Mrs. Milly Tate $100, and to pay all the costs of the claim suit, which was to be dismissed.

Said witness, Rogers, testified, that the claim suit was reached on the docket the next morning, when Salmons refused to pay or to confess judgment for the cost of the claim suit, and denied that he had promised so to do; that Salmons admitted to witness afterwards, that he had not paid $25 of the $300 which he had agreed to pay, and that he had never paid the $100 to Mrs. Milly Tate.

It appears, that the claim suit was not dismissed, but was tried upon its merits at a subsequent term, and there was a verdict and judgment in favor of the claimant.

There was evidence tending to show, that some payments had been made upon the judgment anterior to the compromise, and that at that time the costs of the claim suit amounted to $124, but the final costs amounted to $246. The judgment of Roundtree & Baldwin had never been credited, anterior to the

compromise, with any sum. Upon the settlement, it appears that Roundtree executed a receipt to Salmons against the judgment.

This being substantially the proof, the defendant asked the court to charge the jury, that the plaintiff was not entitled to recover any part of the costs of the claim suit, if they believed that it was prosecuted after the compromise and settlement above alluded to. The court refused this charge as asked, and told the jury, "that if the defendant, in consideration of the plaintiff in execution entering satisfaction of the judgment, or with a view to benefit Turner, undertook to pay said costs, and when the cause was called up refused to bind himself therefor, then the plaintiff was entitled to recover the costs which had accrued up to the time he so refused." This refusal to charge, with the qualification given by the court, is assigned for error.

The evidence conduced to show, that Salmons had agreed to pay the cost of the claim suit; but when the case was called up next morning in court, he refused to pay it, or to confess judgment for it, and denied that he was bound to do so. We understand by this language of the bill of exceptions, that the defendant in the execution, Salmons, denied not only that he was under any obligation to confess judgment for the cost, but also denied that he was under any obligation to pay the same; in other words, that he repudiated this part of his undertaking when called on for its performance.

Now we may concede, with the counsel for the plaintiff in error, that the dismissal of the claim suit by Roundtree, and the payment of the costs thereof by Salmons, were, by the agreement as detailed by the witness, Rogers, to be cotemporaneous acts, the one dependent on the other; still, if Salmons, at the time when he was to have performed his part of the agreement, refused to do so, not because the suit was not dismissed, but on the ground that he was under no obligation or promise to pay, we think it very clear that he can take no advantage of his own wrong, and be heard to object that the suit was not dismissed. By his wrongful act he prevented the dismissal, and the most that he can claim is, that he should not be placed in a worse condition than if the suit had then been dismissed; in other words, that he should pay no more of the cost than his agreement required him to pay.

It is further objected to the charge, that the court placed the plaintiff's right to recover upon the ground that Salmons "refused to bind himself for the cost," after agreeing to pay it, &c. We understand the court to mean by this, that if the jury believed Salmons refused to acknowledge his liability to pay, or rather denied that he had promised to pay it. The charge must be construed with reference to the testimony; and as there was no proof that Salmons had agreed to confess judgment for the cost, the reasonable inference from the bill of exceptions is, that the privilege of confessing judgment was tendered him upon his refusal of payment. Although the charge is certainly very badly worded, we must intend that the "refusal to bind himself for the cost" had reference to Salmons' denial of his promise to pay, of which there was evidence, and not to his refusal to confess judgment, which, according to the proof, formed no part of the agreement. It is further insisted, that the charge referred the consideration of Salmons' agreement to pay the cost, in the alternative, either to the satisfaction of the judgment by Roundtree, or to benefit Turner; and that the jury may have found upon the latter consideration, which is not a good one to support Salmons' undertaking to pay the debt of another for which he was in no wise bound. In response to this objection, we need only say, that the court went beyond the proof, in making the benefit to Turner any part of the consideration, and as to that portion of the charge, it was abstract; but the proof showed that the compromise and satisfaction of the judgment and dismissal of the claim suit, the said Salmons paying the cost thereof, was the true consideration, and about this there was no conflict in the evidence; referring the charge then to the proof, it is too clear to admit of doubt, that, although a portion of it was abstract, it could not possibly have worked any injury to the plaintiff in error. The rule is, that error and injury must concur to entitle the plaintiff to a reversal of the judgment. It results from what we have said, that there was no error in refusing the charge as asked, nor in the qualification given by the court, which can avail the plaintiff.

We come next to consider the second charge, which was, "that if, at the time of said settlement, there was only $350 due on said judgment, then the promise to pay more than that balance was without consideration and void, and the plain-

tiff could only recover that sum." This the court gave, but qualified it by saying, that, if an execution had been levied on a negro as the property of Salmons, and Turner had claimed said property under the statute, in said claim suit, then the promise of Salmons to pay the cost of the claim suit was upon a good consideration, and the plaintiff was entitled to recover the costs which had accrued up to and during the term of the court when the costs should have been paid (February term, 1847), although it amounted to more than $350. By this charge, the court appears to take a partial view of the agreement as shown by the proof, and concerning which, as we have said, there was no conflicting evidence. It was not proper to sever and divide up the consideration, making the satisfaction of the judgment the consideration for the notes and undertaking of Salmons to pay $100 to Mrs. Tate, leaving the dismissal of the claim suit the isolated consideration for the undertaking to pay the cost. On the other hand, the agreement of Salmons to pay the cost was based upon the undertaking of Roundtree both to satisfy the judgment and dismiss the claim suit; and this consideration was not only a detriment to the plaintiff, Roundtree, but a benefit to Salmons; so that, applying the rules above laid down, both the charge and the qualification were erroneous; the charge, because it allowed only a recovery for the sum due on the judgment to be satisfied, without any compensation for the detriment to the plaintiff, by reason of his dismissing the claim suit; the qualification, because it is not only abstract, as predicated upon facts outside of the proof, but as resting the right of recovery, as to the cost, upon an isolated portion of the consideration. Both the charge and qualification, however, restrict the plaintiff's right of recovery, and, when considered with reference to the proof, were too favorable for the defendant below. These errors could not have been prejudicial to Salmons, as they imposed restrictions on the plaintiff's right to recover, not warranted by the proof. We cannot, therefore, reverse on account of them.

It is supposed, finally, that the court erred in allowing a recovery for the costs which accrued during the February term of the claim suit, when it should have been dismissed. But all the proof is set out, and this does not show that any cost accrued pending the term, after it was called up and the defend-

ant below refused to pay it, or admit his liability to do so. If the bill of exceptions was silent as to the proof, as this is an affirmative charge, we should be compelled to presume that there was proof on which to predicate it, and to hold that it was fatally erroneous; but the error is cured by its being shown to be abstract, and as it could not have misled the jury for want of facts to which they could apply it, it likewise is error without injury.

Let the judgment be affirmed.

BROWN *vs.* JONES.

1. A written contract of sale, containing a warranty of soundness, is the highest and best evidence of that warranty, and as such admissible to prove it, in *assumpsit* for its breach, although the consideratio n averred in the declaration is a certain sum of money, while that expressed in the written contract is defendant's acceptance for that sum.
2. In *assumpsit* for breach of warranty of the soundness of a horse, which became blind within a month after the sale, a charge based upon the condition of his eyes at the time of sale, is abstract, when the only evidence before the jury relates to their condition a month previous to that time.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

ASSUMPSIT by Benjamin R. Jones against Robert L. Brown, for a breach of warranty of the soundness of a horse; the declaration containing four counts, each of which averred that defendant, at the time of sale, "falsely warranted the said horse to be sound, when in fact he was unsound." The only plea was *non assumpsit*. On the trial, the plaintiff offered in evidence the written contract of sale, containing a warranty of soundness, for the sole purpose of proving the warranty. The defendant objected to its introduction for this purpose, but his objection was overruled, and he excepted. All the facts of the case are stated, substantially, in the opinion of the court. The admis-

sion of the evidence objected to, and the refusal of the court to charge as requested, are assigned for error.

N. Harris, for plaintiff in error, contended, that the written contract was not admissible in evidence, because the consideration alleged in the declaration was the payment of a certain sum of money, while that expressed in the writing was defendant's acceptance for that sum.—1 Chitty's Pleadings, top pp. 304, 306, 310; Stone v. Knowlton, 3 Wend. 374; Obert v. Whitehead, 6 Hals. 294; 1 Green. Ev. § § 66, 67; 2 Phil. Ev. (C. & H.'s Notes) 512; Burden v. Manning, 2 N. H. 290.

2. That the charge asked should have been given, because the evidence showed that the horse could see at the time of sale, but had some natural physical conformation of the eyes which might end in blindness; such conformation was not unsoundness: it requires actual disease to produce unsoundness.—Oliphant on Horses (58 Law Lib.), top p. 47 (marg. 27).

Elmore & Yancey, *contra*, contended, that there was no material variance between the contract alleged and that expressed in the writing; and that the writing was admissible to prove the warranty, even if the consideration expressed in it was different from that averred in the declaration; citing 1 Chitty's Pleadings, pp. 291, 293, 305, 314; Stark. Ev. 1533, 1534, 1565, 1603; 9 East 349; 2 N. H. 160; 1 H. Black. 283; 7 Cranch 413; 17 Cowen 343; 18 *ib.* 498; 7 Mass. 65.

2. That the charge asked was abstract, and therefore properly refused.

LIGON, J.—The warranty of the defendant below is, in each count in the declaration, averred to be one of general soundness, and is substantially the same in every count. The bill of exceptions distinctly states, that the instrument of writing, offered by the plaintiff below, and permitted by the court to be read in evidence to the jury, was so offered and admitted for the sole purpose of establishing what that warranty was, and is in these words:

"Received of B. R. Jones his acceptance for one hundred and sixty-five dollars, for a grey horse, due October 1st, 1850, payable at Henley's office, which horse I warrant sound.

(Signed.) R. L. Brown."

February 13th, 1850.

There is no discrepancy whatever, between the clause containing the warranty in this instrument, and the terms in which it is averred in the declaration, and it was rightly allowed to go to the jury for the purpose for which it was offered, as it is the highest and best evidence of the warranty.

2. Neither do we think there was error in refusing the charges prayed by the defendant in the court below. It was clearly shown, that he had made a general warranty of soundness at the time he sold the horse to the plaintiff; it was further proved, that he had received the full amount of the purchase money, and that the horse became blind in about thirty days after the sale. It was also deposed by a farrier, who was admitted by both parties to be skillful and fully competent to give an opinion in relation to the diseases of horses, that about a month before the sale to the plaintiff, the witness had examined the horse with the view of purchasing him, when he found that his eyes were small, black, watery and weak; but besides this the horse could see well, and the witness' opinion was, that in the summer he would go blind, and that all horses having such eyes would become blind at some period of their lives. It was also proved, that had the horse been sound, he was worth about the sum paid for him by the plaintiff. The farrier examined him in January; the plaintiff purchased him February, and he became blind in March. The record contains no proof of the condition of his eyes at the time of the sale to the plaintiff, or at any time previous, except on the occasion named by the farrier. On this proof, the defendant moved the court to charge the jury, first, that if they believed from the evidence that the horse, previous to, and at the time of the sale, had small and black-looking eyes, but before and at the time of the sale was able to see well, then the plaintiff cannot recover; second, that if they believed from the evidence that the horse, previous to and at the time of the sale, had small and black-looking eyes, but at that time could see well, the plaintiff could not recover, although horses having such eyes usually go blind." The vice of both these charges is, that there is no proof in the record upon which to base them, and consequently they are abstract. The condition of the eyes of the horse as to his ability to see well at the time of the sale, is no where even hinted at in the evidence; and as to their condition *previous* to the sale, there is no proof except the

testimony of the farrier, and that relates to a single point of time about a month before that event. Charges of this character seldom fail to withdraw the minds of the jury from the real facts of the case, and thus misguide them; and for this reason they should never be given by the court.

To the charge given no exception is taken; and as we have seen that the other rulings of the court are free from error, the judgment of the court below must be affirmed.

BROWN *vs.* BEASON.

1. A widow may maintain trover for personal property belonging to the estate of her deceased husband of which she had possession several years after his death, when no letters of administration have been granted on his estate.
2. In trover, where there has been a wrongful assumption of property by the defendant, which, of itself, is a conversion, no demand is necessary before suit brought.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. THOMAS A. WALKER.

TROVER by Susannah Beason against Calvin Brown, for a mule which was shown to have belonged to the plaintiff's husband at the time of his death. One Murphy, a witness for plaintiff, testified, "that he knew the parties to this suit and the mule sued for; that plaintiff's husband died in 1842, owning, at the time of his death, this mule and another one, a horse and other property; that said Beason left several children, some of whom were over twenty-one years of age, and some minors, four or five of whom lived with plaintiff after the death of their father; that the mule sued for, as well as the other property left by said Beason at his death, remained unadministered with the family, and was used and controlled by plaintiff as her own; that William Beason, one of plaintiff's sons, who lived with her, frequently used the mule, just as a boy in the family would; that he was over the age of twenty-one

years, and lived in the family of his mother, the plaintiff; that one of her children was then a minor; that he had seen him ride the mule frequently; that in January, 1852, he rode the mule to Guntersville, and while there he saw the defendant have the mule in his possession; that defendant asked witness, if he claimed the mule; to which witness replied, that he did not, but it belonged to the widow Beason; to which defendant replied, that he had got or won the mule from William Beason, or fifty dollars in the mule; that the mule was worth from $80 to $85.

"This was all the proof in the cause; and there being no conflict in it, the court charged the jury, that, if they believed the testimony, they must find for the plaintiff; to which charge the defendant excepted. The defendant then asked the court to charge, that, unless the plaintiff proved a demand of the mule from defendant, before suit brought, she could not recover; which charge the court refused to give, but charged the jury, that the service of the writ in this case was a sufficient demand to maintain the action." The defendant excepted to the refusal, and to the several charges given; and these rulings of the court are now assigned for error.

Belser & Rice, for appellant.

Louis Wyeth, *contra.*

GOLDTHWAITE, J.—We are satisfied that the plaintiff below might properly maintain the action, against every one but the rightful administrator, upon a principle analogous to that which enables the finder of lost property to maintain the same action against every one but the real owner. During the period that administration was not granted, the legal title or real ownership was, in one sense, in no one.

2. The mule sued for was in possession of the defendant, who, on being informed that it was the property of the plaintiff, replied, that he had got or won the mule, or fifty dollars in the mule, from William Beason, who, the evidence proved, was the son of the plaintiff, living with her, and using the mule as a boy in the family would. The rule is, that no demand is necessary in trover, where a conversion can be proved without one; but the wrongful assumption of the property in the goods is, of

itself, a conversion.—1 Chit. Pl. 179, and cases there cited; Hyde v. Noble, 13 N. H. 494; Lee v. Mathews, 10 Ala. 682. This is the case here, as the language used by the defendant will reasonably admit of no other construction, than that he claimed the right to hold the mule, which was in his possession, because he had got or won it from William Beason, who had no right to dispose of it. What was this, but the wrongful assumption of property? We think the court was right in its charge upon the evidence, and this being the case, the charge requested was properly refused; and, although instructions that the writ in this case operated as a demand, asserted an erroneous legal proposition, yet, as the plaintiff was entitled to recover without a demand, the judgment is not reversible on that ground, and must consequently be affirmed.

GLASS *vs.* GLASS.

1. A judgment may be rendered *nunc pro tunc*, on motion, without notice to the defendant.
2. Under the act establishing Courts of Probate, the Circuit Court has power to make amendments *nunc pro tunc* of the judgments of the County Court, in causes transferred to the former court under that act.
3. A judgment may be rendered *nunc pro tunc* and revived by *scire facias* at the same term; and there is no impropriety in uniting a notice of the motion to amend in the *sci. fa.* to revive.
4. When the minute entry recites that it was made to appear to the court that a judgment had been duly rendered, which the clerk had omitted to enter, it will be presumed, on error, that it was made to appear by sufficient legal evidence; if the evidence was insufficient, the defendant must show it by bill of exceptions.

ERROR to the Circuit Court of Marengo.

Tried before the Hon. GEORGE D. SHORTRIDGE.

MOTION for a summary judgment. The first paper in the record is a notice of motion for a summary judgment, by Williamson Glass against Zachariah Glass, at the March term,

1847, of the County Court of Marengo, for the sum of $150, which, as said notice alleges, said Williamson Glass had paid, in part satisfaction of a judgment rendered in the County Court of Marengo, in favor of one Browning, against said Zachariah and Williamson Glass, on a note for $136 31, executed by said Zachariah as principal, and said Williamson as his surety. The motion itself is next copied in the record, and underneath it are these words: "Service proved. Judgment for amount paid, and interest thereon"; and opposite to these words, on the margin of the transcript, is written, "Memo. *per curia* on motion docket."

The next paper in the record is entitled "motion to revive and render judgment *nunc pro tunc*," in the Circuit Court, at its Spring term, 1851. This motion recites, that a motion was made to render judgment in favor of said Williamson Glass against Zachariah Glass, which motion was duly granted by the court in the lifetime of said Williamson; that the clerk had failed to enter up said judgment; that said Williamson had since departed this life, and that Jonathan Glass had been duly appointed his executor; and thereupon "said Jonathan Glass, executor as aforesaid, moves the court to be made a party to the said original motion, and that the said judgment be, according to the previous order of the court, entered up *nunc pro tunc*, and that the same be and stand revived in the name of said Jonathan Glass, executor as aforesaid." The next two entries show, that this motion was continued at the Spring and Fall terms, 1851, of the Circuit Court. At the Spring term, 1852, the minute entry is "Notice ordered, and cause continued"; and after this appears a notice, which sets out, at length, the motion made at the previous Spring term, and notifies the defendant to appear at the next term, and contest the said motion, if he thinks proper.

At the Fall term, 1852, a judgment was rendered on this motion, in which it is recited, that it was made to appear, to the satisfaction of the court, that the defendant had had due notice of the motion; that said Williamson Glass, at the March term, 1847, of the County Court of Marengo, made a motion for a summary judgment against Zachariah Glass, for $150, paid by him as surety of said Zachariah, which said motion was duly granted; that the clerk wholly failed to enter

of record said judgment on the motion aforesaid; that Williamson Glass has departed this life, and said Jonathan Glass has been duly appointed his executor; "Therefore, it is considered by the court, that the judgment aforesaid be and stand revived in the name of said Jonathan Glass, executor as aforesaid; that said Jonathan, executor as aforesaid, recover of said Zachariah Glass, now, as of the term of said County Court held on the third Monday in March, 1847, the sum of $211 20, the amount of the judgment aforesaid," &c.

The errors assigned are, first, "that the notice issued from the Circuit Court does not set out the original motion in the County Court, upon which the judgment of the court is predicated, but sets out one as made in the Circuit Court"; second, "that the motion in the Circuit Court was discontinued, by the plaintiff's failing to issue any notice to the defendant until after two terms had elapsed"; third, "that said motion was the commencement of a suit for the revival of a former motion, and the court erred in rendering judgment at the first term after service of the motion"; fourth, that the Circuit Court had no jurisdiction, under the act establishing Courts of Probate, or under any other act, to enter up judgment *nunc pro tunc* on motions made in the County Court; fifth, that the court erred in entering judgment against the plaintiff in error on the facts set out in the record, "as it does not show that the judge of the County Court made the entry on the motion docket."

William M. Byrd, for plaintiff in error.

CHILTON, C. J.—1. It is objected, that the notice in this case is defective, in failing to set out the original motion made in the County Court. This objection, however, cannot prevail, as the motion in the Circuit Court is to amend the judgment rendered by the County Court *nunc pro tunc*, and so far as this amendment is concerned, no notice is necessary.—Allen & Deane v. Bradford & Shotwell, 3 Ala. 281.

2. Neither do we entertain any doubt, that a proper construction of the act of 1849–50, establishing Courts of Probate, &c. (see Pamphlet Acts 35), authorizes the Circuit Court, to which the papers &c. in the cause have been transferred, to make amendments *nunc pro tunc* of the judgments of the County

Court, whose jurisdiction over the cause, by said act, is transferred to the Circuit Courts respectively.

3. The motion in the Circuit Court is in the nature of a *scire facias* to revive the judgment, which it was also proposed to have entered *nunc pro tunc*, in the name of Jonathan Glass, the executor of Williamson, who had departed this life since the rendition of the imperfect judgment by the County Court. We think there was no impropriety in uniting with the *scire facias* to revive a notice of the motion to amend. The two motions, if the court be so inclined, may be taken up and disposed of together; and we are aware of no rule of practice, which forbids that the party should have a judgment of revivor at the same term to which his *scire facias* is made returnable.

4. As to the objection, that the facts did not warrant the amendment, we have only to say, that the entry shows it was made to appear to the court that a judgment had been duly rendered by the County Court, which the clerk had omitted to enter. We must intend that it was made to appear by the proper evidence: it may have been by the entry of the judge on the motion docket in response to the motion, which has several times been held sufficient to amend by. If the evidence had been insufficient, the defendant could, and ought to have shown it by bill of exceptions.—3 Ala. 281, and cases cited; Harris v. Bradford, 4 Ala. 215.

5. It is insisted by the counsel for the plaintiff in error, that the motion to amend and revive was discontinued by failing to prosecute it until two terms had elapsed from the term at which it was submitted. The record, however, shows it was regularly continued from term to term down to the time of trial.

We perceive no error in the record.

Let the judgment be affirmed.

WHEELER *vs.* POUNDS.

1. P., having traded horses with M., claimed of the latter $20 for cheating him; he afterwards sold the horse which he obtained by the exchange to W., and it was agreed between them, that P. should sue M. for the $20; that W. should have the recovery if he succeeded, and should pay all costs if he failed; judgment for cost having been finally rendered against P., W. promised the clerk of the court that he would pay them; but having failed to do so, P. paid the costs, and then sued W. to recover them: *Held*, that the contract was champertous, and that W.'s promise to the clerk did not aid plaintiff.

ERROR to the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

ASSUMPSIT by Zachariah B. Pounds against Gideon R. Wheeler, on the common money counts; pleas, *non assumpsit*, statute of frauds, and want of consideration. The bill of exceptions is as follows:

"This cause coming on for trial, the evidence conduced to show, that Pounds had traded horses with one Marshall; that Pounds claimed $20 of Marshall for cheating him in the trade; that Wheeler bought the horse from Pounds for $50, and it was, at the same time, agreed that Pounds should sue Marshall, in an action of damages, in a justice's court, for $20; and that amount, or any other, if recovered, was to be paid to Wheeler; that if the suit failed in the justice's court, Pounds was to take the case, by appeal, to the Circuit Court; if Pounds succeeded in that court, Wheeler was to have the recovery; and if Pounds lost the case, Wheeler was to pay all the costs. The evidence conduced to show, that both Pounds and Wheeler were in attendance on both courts, where the case against Marshall was tried; and that Marshall finally succeeded in obtaining judgment against Pounds for costs. Pounds then proved that he had paid the costs, and that Wheeler requested the clerk of the Circuit Court not to issue execution against Pounds, as he was responsible for the cost, and promised to pay them. *Upon this evidence, they must find for the plaintiff;* defendant excepted,"

&c. The charge of the court, as shown by the bill of exceptions, is now assigned for error.

J. T. Brock, for the plaintiff in error, contended, that the contract shown by the evidence was champertous, and therefore could not be enforced; citing Burt v. Place, 6 Cowen 431; Arden v. Patterson, 5 Johnson's Chan. 44; Rust v. Lome, 4 Litt. 417.

Geo. W. Gunn, *contra*, insisted that the contract was not champertous, and cited the following cases: Knight v. Sevain, 6 Green. 361; 1 U. S. Digest, p. 503, § 14; 3 Cowen 624; Campbell v. Jones, 4 Wend. 306; Stoddard v. Mix, 14 Conn. 12; Evans v. Bell, 6 Dana 471; Wilhite v. Roberts, 4 Dana 172; 13 Metcalf 362; 8 Johns. 220; 3 Fairf. 111; 7 Humph. 347.

LIGON, J.—The contract in this case is void for champerty. It is against the policy of our law to permit the traffic in law suits, thus encouraging the bringing of actions, when otherwise no suit might ever arise. Champerty is a bargain with a plaintiff or defendant *campum partire*—to divide the land, or other matter sued for—between them, if they succeed at law; the champertor undertaking to carry on the suit at his own expense. Bouv. Law Dic., tit. Champerty. This offence differs from maintenance in this: in the latter, the person assisting the suitor receives no benefit; while in the former, he receives the whole, one half, or other portion of the thing sued for.—Arden v. Patterson, 5 Johns. Ch. Rep. 44; Bouv. Law Dic., tit. Champerty. So odious, in the eyes of the law, are these contracts, that they confer no rights on the parties making them, and if one pay out money under them, he cannot recover it back. Burt v. Place, 6 Cow. 431.

The promise made to the clerk in this case, being based upon the former champertous agreement, does not strengthen the case of the plaintiff in the court below.

Our conclusion is, thatthe Circuit Court mistook the law in its charge to the jury; and the judgment must therefore be reversed, and the cause remanded.

PITTS *vs.* WOOTEN'S EXECUTORS.

1. Where several co-executors qualify and give bond, a promise by the sole acting executor, who has the possession and control of the entire estate, will not remove the bar of the statute of limitations and revive the debt against the estate.

ERROR to the Circuit Court of Russell.
Tried before the Hon. ROBERT DOUGHERTY.

ASSUMPSIT by Wm. W. Pitts against Benjamin Wooten and Samuel Crowell, as executors of William Wooten, deceased, on an open account; the pleas were, the general issue, and the statute of limitations of three and six years. On the trial, the plaintiff proved the testator's indebtedness on the account, which, upon its face, was barred by the statute of limitations; that both of the executors qualified, and gave bond, but that Crowell was the sole acting executor, and had the possession and control of the entire estate; that while acting as such, and within three years before the commencement of this suit, said Crowell admitted the correctness of said account, and promised to pay it.

The court charged the jury, that Crowell's promise, as shown by the evidence, would not take the case out of the statute of limitations; to which charge the plaintiff excepted, and thereupon took a *non-suit*. The charge of the court is now assigned for error.

BELSER & RICE, for plaintiff in error.
GEO. D. HOOPER, *contra*.

GOLDTHWAITE, J.—That the personal representative may revive a debt barred by the statute of limitations, by a promise to pay, is a settled question in this court.—Hall v. Darrington, 9 Ala. 502; Towns v. Ferguson, 20 *ib.* 147. In Caruthers v. Mardis, 3 Ala. 599, it was held, that a promise by one of two administrators would not take the case out of the statute, where the action was against both.

In the present case, the evidence shows, that the executor who made the promise had, at the time, the entire control and possession of the estate, and was the sole acting executor, although the others had qualified and given bond as such; and it is supposed, that these facts distinguish it from the case last cited, and bring it within the influence of Hall v. Darrington, *supra*. That case, however, rested upon the fact, that the administrator making the promise was the sole representative at the time the promise was sought to be enforced against the estate. Here there were other executors; the assets might come into their hands; and if the promise revived the debt against the estate, it would bind it as well in their hands, as if in the posssession of the executor who revived it. We know of no way, where there are two administrators in the State, of rendering a judgment against one, which would bind the assets in the hands of both; which must be done, if the effect of the promise by the one is to revive the demand against the estate.—That the judgment could not be rendered against both the representatives, upon the mere promise of one, is clear, as the judgment would operate as an admission of assets against each, and thus might render the one who did nothing responsible. We concede, that if one executor contributes, in any way, to a wasting or misapplication of assets by the other, he would be liable.—Will. Ex. 1292. The admission of assets by one could not operate as an admission by the others, unless, by assenting to it, they participated in the act; and the fact that one executor was in possession of the assets, and attended solely to the business of the estate, is no evidence that his co-executors assented to an admission of assets made by him.

Under these circumstances, there was no error in the charge, and the judgment is affirmed.

SPIVEY *vs.* McGEHEE ET AL.

1. A writ of *ne exeat* was granted in a chancery cause, upon complainants' entering into bond conditioned that they should "prosecute their said bill and writ to effect," or, failing therein, should pay to the defendant all such costs and damages as he might "sustain from the wrongful filing of said bill, or the wrongful suing out of said writ of *ne exeat*." The defendant having brought suit on the bond, *it was held*, that, although the condition of the bond was not complied with by merely prosecuting the bill to effect, yet an order discharging the defendant from custody under the writ, upon his delivering up to complainant certain slaves in his possession, was not such a failure to prosecute said writ to effect, as would entitle the defendant to maintain an action on the bond for damages.

ERROR to the Circuit Court of Macon.
Tried before the Hon. JNO. GILL SHORTER.

ABNER McGEHEE filed a bill in chancery against Eli B. W. Spivey to foreclose a mortgage on certain slaves, and prayed a writ of *ne exeat* to prevent the defendant from removing with the slaves beyond the limits of the State. This writ was granted, upon complainant's entering into bond conditioned "according to law"; and a bond was accordingly given, with the following condition: "Now, if the said complainants shall prosecute their said bill and writ to effect, or, failing therein, shall well and truly pay, or cause to be paid, to the said Spivey, all such costs and damages as he shall sustain from the wrongful filing of said bill, or the wrongful suing out of said writ of *ne exeat*, then this obligation to be void," &c. After the coming in of defendant's answer, an order was made in the cause, "that upon defendant's delivering to complainant the mortgaged negroes remaining in his possession, the sheriff of Russell do release and discharge said defendant from custody under said writ of *ne exeat*"; and under this order the defendant was discharged from custody, upon his delivering up to the sheriff four of the mortgaged negroes. Upon the final hearing, an account of the mortgage debt was ordered, and a sale of the mortgaged slaves decreed.

After the final decree in the chancery cause, the defendant therein brought an action at law on the bond, for damages; and he introduced in evidence, on the trial, the papers in said chancery cause showing the facts above recited. The court charged the jury, at the request of the defendant's counsel, that, if they believed all the evidence, the plaintiff could not recover; to which charge the plaintiff excepted, and he now assigns it for error.

BELSER & RICE, for plaintiff in error.

N. W. COCKE, *contra.*

CHILTON, C. J.—The evidence is all set out in the bill of exceptions taken upon the trial, and the court charged the jury, in substance, that if they believed it all, they should find for the defendants. The question is, as to the legality of the charge, when considered in connection with the facts.

The condition of the bond, alleged in the declaration to have been broken, is, to prosecute "the *bill and writ to effect*, and, in the event the complainants fail therein, that they shall pay to the defendant all such costs and damages as he may sustain by the wrongful suing out of the said writ of *ne exeat*," &c.

We do not agree with the counsel for the defendant, that the condition is complied with by merely prosecuting the *bill to effect*. The complainants may have had a very good ground for equitable relief, arising out of their unsatisfied mortgage; but it by no means follows, that there was any necessity for the writ of *ne exeat*. The condition was, therefore, very properly made to include both, and was broken if either was not prosecuted to effect, if the damages and costs consequent thereupon were not paid.

Upon looking, however, more narrowly into the record, we have concluded, against our first impression, that the record shows a compliance with the condition as to the prosecution of both the bill and writ to effect. The record no where shows that the writ of *ne exeat* was discharged. It is true, the person of the defendant was ordered to be released from the custody of the sheriff, upon his delivering over to the complainant the four slaves which he had in his posses-

sion, on the 11th of June, 1846, and which slaves the Chancellor very erroneously concluded were sufficient to satisfy the mortgage debt. But the facts, that he was required to surrender such slaves as the condition of his release from custody, and that the slaves so surrendered were sold, and the proceeds made available to satisfy, *pro tanto*, the mortgage debt, show that the writ was not made powerless by its discharge, but was made to accomplish a beneficial result to the complainants. At all events, it was made effectual to place the four slaves, which were sold, in the possession of the sheriff. Whether such an order was correct or not, is a question not before us, and consequently one upon which we express no opinion; all we now decide is, that the order found in the record, for the defendant's release from custody under the writ, upon surrendering certain slaves, is not such a failure to prosecute the writ to effect, as entitled Spivey to maintain this action for damages, within the meaning of the condition of the bond.

Our opinion is, that, under the facts presented by the bill of exceptions, the charge of the court was proper; and the judgment must be affirmed.

WESSON ET AL *vs.* CROOK.

1. A writ of error will be quashed, on motion, when the record shows that the defendant therein was dead when the writ issued, and that he had no legal representative.
2. Writs of error are governed, as to the practice in making parties, by the rule laid down in Sewall v. Bates, 2 Stew. 462; but when an appeal is taken under the Code, parties may be made in court below (§ 3069).

ERROR to the Chancery Court of Benton.
Heard before the Hon. DAVID G. LIGON.

MOTION to quash the writ of error.

RICE & MORGAN, for the motion.

WHITE & PARSONS, and J. B. MARTIN, *contra.*

LIGON, J.—It is conceded, by a written agreement on file, that Crook, who is sought to be made defendant in error, had been dead more than a year before the writ of error bears date, and that he is without legal representatives.

The prosecution of a writ of error is a new suit between the parties, commenced by the issue of the writ and service of the citation which is required to accompany it. Until this is done, this court has no jurisdiction either of the case or parties, any more than the inferior courts would have in cases in which the leading process of those courts had not been executed on the defendant. In either case, if the process issue against a dead man, it is a nullity.

We have already decided, that, if a party die after judgment in the court below, the clerk of that court cannot issue a writ of error; but that the party desiring to sue out the writ of error must suggest the death in this court, produce a copy of the record and of the letters of administration, and either move for a *scire facias* against the representative, to show cause why he should not be made a party defendant and a writ of error be awarded by this court, or for a *certiorari* to bring up the record. Sewall v. Bates' Adm'rs, 2 Stew. 462. Such, we think, should have been the course pursued in this case.

Appeals taken under the Code, so far as the practice in cases like the present is concerned, must be governed by section 3039, which, it will be perceived, differs from the rule in Sewall v. Bates, *supra*, and allows the parties to be made by the clerk, judge of probate, or register, in the court below.

Let the writ of error be quashed.

HAMNER, ADM'R, *vs.* MASON ET AL.

1. Under the statute authorizing the discharge of the sureties of a guardian (Clay's Digest 221 § 5, 222 § 7), the taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge; but the existence of this fact is to be determined by the judge to whom the application is made, and his decision is final and conclusive, and cannot be contradicted.
2. Therefore, where the sureties of a guardian of several minors applied for a discharge from all further liability on their bond, and a decree was thereupon rendered by the court, in which it was recited that the guardian had given a new bond, and ordered that the old sureties be discharged from all further liability: *Held*, in an action against the sureties on the old bond, that the recital in the decree was conclusive of the fact that a new bond had been given, although the name of the minor for whose use the suit was brought was entirely omitted from the new bond, which did not therefore protect his estate.
3. An execution cannot issue under the statute (Clay's Digest 305 § 45) against the sureties of a guardian, on a decree of the Orphans' Court, against the principal, embracing some items which accrued after their discharge.

APPEAL from the Court of Probate of Wilcox.

GEORGE W. HAMNER, as the administrator of Benjamin Williamson, Jr., obtained a decree in the Court of Probate of Wilcox, on the 13th of December, 1850, for $3265 09, against Benjamin Williamson, as guardian of his said intestate; on this decree an execution was issued, and returned "no property found," and thereupon another execution was issued under the statute, against the appellees, as the sureties of said guardian on his official bond. The appellees filed a petition for a *supersedeas* of this execution, alleging that they became the sureties of said Benjamin Williamson on the 24th of September, 1840, on his bond as guardian of Benjamin Williamson Jr., Sarah Williamson, Mary Jane Williamson, and Richard Williamson, who were minor children of Richard Williamson, deceased; that they made application to the Orphans' Court, on the 24th of February, 1842, to be discharged from all further liability on their bond; that upon this application a decree was rendered by said court (which is set out at length in the petition, and for

which see the opinion), discharging them from all further liability on said bond; that said decree, on which the execution sought to be superseded was issued, was rendered on a final settlement of said Williamson's guardianship of said Benjamin Williamson Jr., which included all the estate of said ward received by his said guardian after the appellees' said discharge in 1842, and that no liability prior to that time against the guardian was ascertained by the said decree or settlement.

On the trial of the *supersedeas*, which was had by consent before the judge, the alleged application by the appellees to be discharged from all further liability on their bond was admitted, and the decree of the court discharging them was offered in evidence. The appellant then proved, that the new bond referred to in said decree did not include the name of said Benjamin Williamson Jr. and Mary Jane Williamson, but was the bond of said Williamson as the guardian of the other minors. Upon this evidence the court ruled, that said decree discharged the appellees notwithstanding the omission to include in the new bond the names of said Benjamin Williamson Jr. and Mary Jane Williamson; to which ruling of the court the appellant excepted, and he now assigns it for error.

WATTS, JUDGE & JACKSON, for appellant:

1. The Probate Court is a court of limited and special jurisdiction, and can do no act unless authorized by the Legislature; and the statute authorizing its action must be strictly pursued. All the facts necessary to give it jurisdiction must be distinctly and affirmatively set forth in the record.—See Talliaferro, adm'r, v. Thompson, 3 Ala. 670; Griffin v. Griffin, 3 Ala. 623; Blann v. Grant, adm'r, 6 Ala. 110; Dakers v. Hudson, 6 Cowen 224; Thatcher v. Powell, 6 Wheaton 119; Bishop's Heirs v. Hampton, 19 Ala. 761.

2. The statute (Clay's Digest 221 § 5) directs the Probate Court to order executors and guardians to give further security on complaint of their sureties or their representatives, and section seven gives the power to the judge, when new securities shall be "ordered and taken," to discharge the original securities. Now, independent of this clause of the statute, it is not pretended that the judge of the Orphans' Court had the power to discharge the securities from the obligations of their contract.

3. The condition of a guardian's bond (Clay's Digest, p. 221 § 3) shows what is the extent and terms of the contract entered into by every guardian and his securities. The judge of the Orphans' Court had no right to alter this contract, except on the terms of the 7th section of the acts in Clay's Digest, p. 222, above referred to, and this must be strictly pursued.

4. The record here shows, that no new security was taken from the guardian; and the judge of the Orphans' Court was not authorized to discharge the old securities until the new security was taken—not only ordered, but "taken." The order of discharge was, therefore, without the jurisdiction of the court, and was therefore void. There are three things which must appear on the record, before the court can undertake to render a decree discharging the old securities: 1st, there must be complaint by the old securities to the judge; 2nd, an order for new security; and, 3rd, the new security must be taken; all these things are essential to give jurisdiction; no one of them can be left out; each is as essential as the other. Now, could the court discharge the securities without a complaint on their part? Could the court discharge without having ordered new or further security to be given? Certainly not. How then can the judge grant the discharge without the new security being taken—the most essential ground upon which the right of the judge to discharge rests?

5. But it is said, that the entry of the judge shows that the new security was given—"taken," in the language of the statute. We insist, that the whole record of the Orphans' Court, in reference to this matter, must be looked to. The bond which was actually given is a part of the record, as much so as the judgment entry; and this shows that no new or further security for one of the wards of the guardian was taken. As to him, therefore, the case stands as though no bond whatever was given. Suppose no new bond whatever had been taken by the judge, could it be said, that his decree of discharge would be otherwise than void? In legal contemplation, no new bond was given, so far as the present plaintiff is concerned. The entry of the judge does not necessarily come in conflict with the other parts of the record; it only shows that a new bond for the minor heirs of the estate of Williamson was given. But the judgment entry refers to the bond which was actually given,

gives the date, the amount, the name of the securities, &c., so as to make it a part of the record, even if it were not so by the general provisions of law, requiring all such documents to be placed upon record as a part of the record and proceedings of each guardianship.

6. If these positions are not strictly correct, see to what consequences the contrary propositions would lead. The patrimony of the ward has been squandered by an improvident guardian; the security on the first bond has been discharged from all liability, and no new security is given for the ward's estate.

7. Suppose the judgment entry had set out, *in extenso*, what the whole record when looked to shows; it would have shown, that on a particular day, the old securities had made complaint, that the judge had ordered new security, and that the guardian had appeared and given a new bond with security for two of the heirs or wards only; and that, thereupon, the court entered a decree discharging the old securities from all further liability on their bond. It could not, under this sort of entry, have been contended that they were discharged from liability to the ward not included in the new bond. And is not this the actual state of the record in legal contemplation?

ELMORE & YANCEY, *contra*:

1. The judgment of a court of competent jurisdiction is conclusive of the subject-matter of the judgment, and of all the legal consequences of the judgment.—1 Green. Ev. §§ 525, 528, 538, 19; Sims and Wife v. Slocum, 3 Cranch 300.

2. When the court is of limited jurisdiction, or of general jurisdiction with a new and special jurisdiction given by statute, the record must show the facts on which the jurisdiction is exercised; and when these appear in the record, it is conclusive, and cannot be contradicted.—Brittain v. Kinnaird, 1 Brod. & Bing. 432; Mather v. Hood, 8 Johns. 36; Martin v. Mott, 12 Wheat. 19; Stuyvesant v. The Mayor of New York, 7 Cowen 606; Betts v. Bagley, 12 Pick. 582; Lewis v. Intendant &c., 7 Ala. 85. And this holds true, even where the proceeding is an *ex parte* one.—Mather v. Hood, *supra*; 7 Ala. 85, *supra*.

3. The new bond given is not recited, nor referred to in the

judgment, so as to make it a part of the record of the cause.—Bates v. Planters and Merchants' Bank, 8 Porter 99; *ib.* 104; Lightfoot v. Bank of Decatur, 2 Ala. 345; 5 *ib.* 295. In these cases the proceedings were to revise judgments by writs of error; and the court held, that they would not look to notices or other papers sent up with the transcript, either to reverse or sustain a judgment, unless they were so recited or referred to in the judgment entry as to make them part of it.

4. The new bond given is no part of the record in this case: it is not made so by statute. It may be a part of the record of the guardianship of Williamson; but this proceeding is no part of that guardianship: it is aside from it, and independent of it, although growing out of the fact that the applicants were the sureties of the guardian.

GOLDTHWAITE, J.—The record shows, that the appellees were sureties on the bond of Benjamin Williamson as guardian of Benjamin Williamson Jr. and others, who were minor children and heirs of Richard Williamson; and that on the 24th of February, 1842, they applied to the judge of the Orphans' Court to be discharged from the bond; that at a regular term of the Orphans' Court, on the 24th of March, 1842, the following decree was made: "Estate of Richard Williamson, deceased. This day came Benjamin Williamson, guardian of the minor heirs of said estate, and executed a new bond, with Robert H. Williamson, Ferrin Baldwin, and L. W. Mason, as his securities as such guardian for the faithful performance of the duties required of him by law, in the sum of fourteen thousand dollars; which bond is approved by the court. Ordered by the court, that the former securities be discharged from all further liability." The evidence, on the trial, showed conclusively that, in the new bond referred to in the decree, the name of Benjamin Williamson Jr. was omitted, so that it was, in reality, the bond of Benjamin Williamson as the guardian of the other minor heirs, whose names were set out in it, and not his bond as the guardian of Benjamin Williamson Jr.; and that, as to him, it was the same as if no new bond had been taken.

The question on which the case must turn, is, whether the decree operated as a discharge of the first set of sureties, so far

as the estate of Benjamin Williamson Jr. was concerned ; and this depends upon the conclusiveness of the decree—whether the recital in it, that Benjamin Williamson had given a new bond as guardian of the minor heirs of Richard Williamson, can be contradicted.

By the act of 1821 (Clay's Digest 221 § 5), any guardian may be required to give further security, upon the complaint of any of his sureties ; and by a subsequent section of the same act (*Ib.* 222 § 7), it is provided, that, when a new security shall be ordered and taken of any guardian, the judge may direct such alteration in the condition of the bond as the case may require, and may order the original securities to be discharged entirely, or from the time of taking such new security, as to him shall seem proper. Under this act, we entertain no doubt, that the taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge ; and we think it equally clear from the statute, that it was the intention of the Legislature to submit this fact to the determination of the judge, as a preliminary to his action upon the application ; and this being the case, his judgment as to the existence of the fact was necessarily final and conclusive, at least so far as concerns his authority to discharge the former sureties.

This was the principle in Mather v. Hood, 8 Johns. 36, where the statute gave power to the justice, upon complaint being made of a forcible entry or detainer, to go to the place where the force was made, and record the same, set a fine upon each offender, and commit him to jail until the fine was paid. The suit was against the justice, for fining and imprisoning the plaintiff; and the question was, whether the conviction was traversable ; the plaintiff offering to prove, that the justice did not go, and had no view, and that there was no force. The court held, that, although the proceedings of the justice were altogether *ex parte*, the conviction was conclusive as to these facts. So, also, in Mackaboy v. The Commonwealth, 2 Virginia Cases 268, the record of a riot in view of the justices was held to be unimpeachable. The court say, "No matter whether there was a riot or not, the record shall conclude." Martin v. Mott, 12 Wheat. 19, is to the same effect. The principle of these cases is, that where the fact upon which the power to act depends, is referred by the law-maker to be

determined by the court or officer, the determination of the fact by such court or officer is *res adjudicata*, and cannot be questioned; and this principle is decisive of the main question presented upon the present record. The question as to whether a new bond had been given, was referred to the court, and was determined by it. This fact appears affirmatively from the record, and the recital is not traversable.

The settlement, upon which the decree against the guardian was rendered, appears to have been before the court, and shows that he had received moneys on account of the ward, Benjamin Williamson Jr., to the amount of $2332 94, and that this amount was received after the appellees had executed the bond, and before their discharge from it. The settlement showed, also, that the guardian was entitled to credits, during the same period, of $855 26; and the question was raised, whether the plaintiffs below were entitled to an execution for the difference. Upon this point, it is only necessary to observe, that, if the appellees were liable upon their bond for this amount (a question not necessary to be decided at this time), yet, as the decree rendered against the guardian embraced items which accrued after their discharge, they could not be liable for these items; and as the decree was entire, it cannot be split up, so as to authorize an execution for a part only of the judgment, even if the sureties could be held responsible for such portion by a direct proceeding upon the bond.

The views which we have expressed are decisive of all the points presented by the record. The judgment is affirmed.

COOK, GUARDIAN &C., *vs.* WIMBERLY ET AL.

1. Where letters of guardianship have been granted in this State, the guardian and ward both residing here at the time, the property cannot be removed to another State under the Code (§§ 2031, 2032), upon the application of another guardian appointed there, who alleges in his petition that the ward has been removed to that State.

APPEAL from the Court of Probate of Limestone.

THE appellant filed a petition in the Court of Probate of Limestone for the removal of the guardianship of Sarah M. Copeland to Tennessee. The petition alleged, that the father of said Sarah M. died in Limestone County in this State, which was his place of residence, leaving a widow and four children; that letters of administration were granted on his estate, by the Court of Probate of Limestone, to one William Crenshaw, and letters of guardianship on the estate of said Sarah M. were granted by said court to William S. Wimberly; that said widow, who was the mother of said Sarah M., afterwards intermarried with one Joseph Menafee, and has removed, with her said husband, to White County in the State of Tennessee, carrying with her the said Sarah M., who is an infant under the age of five years; that the petitioner was duly appointed guardian of said Sarah M. by the Quarterly Court of said County of White in the State of Tennessee, which was a court of competent jurisdiction, and that he had given bond and qualified as by law prescribed; and that petitioner and said Sarah M. both reside in said county in the State of Tennessee.

The resident guardian of the said ward and the administrator of her father's estate, both of whom were alleged to have in their hands property belonging to her, were made defendants to the petition; and the prayer of the petition was, that the petitioner might have leave to remove the property of his said ward to Tennessee. The defendants demurred to the petition, and their demurrer was sustained; and this judgment of the court is now assigned for error.

BELSER & RICE, for appellant.

ROBINSON & JONES, *contra*.

CHILTON, C. J.—Section 2031 of the Code provides for the removal of the person and estate of a ward to another State by the resident guardian, upon complying with the requirements of said section, as to making full settlement of his accounts in this State, producing the transcript of his appointment in the State to which he desires to remove the

guardianship, and proof of his having given good security, &c. The succeeding section (2032) applies to cases where the guardian and ward are both non-residents of this State; that is, where the jurisdiction of the court over the ward first attaches in another State by the residence of the ward in that jurisdiction.

It is very clear, that it was not the object of the Legislature to put it in the power of any one who might choose to take the ward without the jurisdiction of the Probate Courts of this State, thereby to oust such courts of their jurisdiction, and to compel a removal of the guardianship to another State. On the contrary, when the ward resides in this State, and a guardian has been duly appointed here, the removal of the ward to another State, while the guardian and the estate remain here, does not constitute such non-residence as is contemplated by section 2032. It may well admit of doubt, whether the ward, without the consent of the guardian, can acquire a domicil in another State. Be this, however, as it may, it would be a clear violation of the rights of the resident guardian, to suffer him to be removed and to be divested of the estate which the law has committed to his management, merely because the party seeking to oust him may have succeeded in removing the ward to another State, and in taking out letters of guardianship there.

Upon an examination of the facts contained in the petition for a removal of this guardianship to Tennessee, it is manifest that the petitioner fails to show such a case as falls within the meaning of either of the above mentioned sections of the Code; and, as the legal sufficiency of these facts was submitted by the demurrer to the petition, we are of opinion the court very properly sustained the demurrer.

Let the judgment be affirmed.

SCOTT *vs.* MYATT & MOORE.

1. A written order, addressed to a mercantile firm, in these words: "Please let the bearer, Mr. O., have any little things he may stand in need of, and I shall be good for the same," held to be a direct, original undertaking, which would continue until revoked, or until the account was closed, and would embrace any articles, of no great value, which would come under the denomination of necessaries for a person in O.'s condition.
2. No notice of acceptance, or demand of payment, before suit brought, is necessary to charge one on whose written order (a direct, original undertaking) goods are furnished to another.
3. Evidence that the goods were charged on the merchant's books to the person to whom they were furnished, and that he afterwards settled the account, by paying a part in cash, and giving his note for the balance, is proper for the consideration of the jury, in determining whether the credit was given to him; but if the goods were sold on the faith of the written order, the rights and liabilities of the parties must be determined by it, and would not be affected by the fact that the merchant treated it as a collateral, instead of a direct undertaking, or that he charged the goods to the person who obtained them.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. THOMAS A. WALKER.

ASSUMPSIT by Myatt & Moore against James Scott, to recover the amount of an account of $120 for goods, wares and merchandise. On the trial, the plaintiffs proved, and read in evidence to the jury, a written order of which the following is a copy:

"Messrs. Myatt & Moore: Please let the bearer, Mr. Orr, have any little things he may stand in need of, and I shall be good for the same. Very respectfully,

January 8, 1850. JAMES SCOTT."

Plaintiffs then offered testimony, tending to show that they had sold goods, wares and merchandise to said Orr, from the 19th Jannary, 1850, until the 1st of January, 1851, amounting to $105 30; that said goods were sold to said Orr on the faith of said written order, and that Orr was a stranger to them; but there was no proof that plaintiffs had, at any time, given notice to defendant that they were selling, or had sold, any goods to said Orr on the faith of said order; and there was no

proof showing any demand of payment for said goods, from said defendant, at any time, otherwise than by the bringing of this suit. The defendant then proved, that the goods so sold and delivered to said Orr were all charged to said Orr alone on plaintiffs' books, and not to defendant; that Orr had settled said account, on the 27th February, 1851, by paying $60 in cash, and giving his note for the balance, dated February 27, 1851, and due one day after date, with interest from January 1, 1851. This note was produced by plaintiff, on notice from defendant, and was proved to be unpaid. Defendant also proved, that said Orr, in the fall of the year 1851, went to Texas, and had not since returned. "There was no proof to show that Orr was in need of the articles bought, except that plaintiffs were merchants, and that Orr delivered the order to them, applied for and bought the goods, and the character and quality of the goods sold to him; the same being articles of men's clothing, tobacco, &c."

On this evidence the court charged the jury, that the instrument sued on in this case was not a collateral guaranty, but was a direct obligation, from defendant to plaintiffs, to pay for the goods bought by said Orr, and that plaintiff could maintain this suit, without proof of notice of the acceptance of the order by plaintiffs, or of the sale of goods to said Orr on the faith thereof, or any demand of payment before suit brought; that the settlement of the account by Orr, by paying $60 in cash, and giving his note, due one day after date, for the balance, did not discharge defendant from liability, if otherwise liable, as to the balance of the account unpaid, under his obligation to plaintiffs, unless said note had been paid.

The defendant excepted to each part of this charge, and asked the court to give the following charges:

1. That, if they believed that plaintiffs, after they had received defendant's said written order, sold the goods embraced in their account to said Orr, charged said Orr alone with them on their books, and then settled said account with him as shown in the evidence, these acts of plaintiffs would show that they had treated said order as a collateral undertaking, and then plaintiffs could not recover, without proof of notice to defendant that his guaranty had been accepted.

2. That, if there was no evidence that plaintiffs, after receiv-

ing said order, gave notice to defendant that they accepted the same, or that they were selling goods to said Orr on the faith of it, but sold said goods to said Orr, charged them on their books to him, applied to him for settlement of the account, received $60 in cash from him, and took his note for the balance, due one day after date, then plaintiffs could not recover.

3. That the instrument sued on is a collateral, and not a primary obligation, from defendant to plaintiffs.

4. That the burthen of proof is on the plaintiffs, to show that said Orr stood in need of the articles sold to him by plaintiffs. This charge the court gave; and defendant then asked the court to charge, that if the only proof in the case, on this point, was, "that plaintiffs were merchants, and that Orr delivered the order to them, applied for and bought the goods, and the character and quality of the goods sold to him, the same being articles of men's clothing, tobacco, &c.," this proof would not be sufficient to entitle plaintiffs to a recovery; which charge the court refused to give.

The defendant excepted to these several refusals to charge as requested; and he now assigns for error the several rulings to which he excepted, as above shown.

I. W. Garrott, for appellant:

1. The instrument sued on is a guaranty.—Goodman v. Parish, 2 McCord 259. The case of Bates v. Starr, 6 Ala. 697, though somewhat similar, is not precisely the present; and that case, it is submitted, is not correct. The case therein cited (Chase v. Day, 17 Johns. 114) is not at all in point.

2. But, if the instrument itself does not show that it was intended as a guaranty, the circumstances place the matter beyond doubt; and the intention of the parties, as shown by the proof, must determine the nature of the transaction.—Story on Contracts, p. 754 § 858; 11 U. S. Digest, p. 247 § 15. The facts that the plaintiffs below charged the goods to Orr alone, called upon him for payment, received from him a part payment in cash, and took his note for the balance; the absence of any notice of acceptance of the guaranty, or of the amount of the account contracted; and that no demand was made before bringing suit: all these facts show conclusively, that plaintiffs below regarded Orr as primarily liable to them, and Scott as collaterally

liable.—Parsons on Contracts, p. 499; Burge on Suretyship, pp. 22, 23; Babcock v. Bryant, 12 Pick. 133; Matthews v. Milton, 4 Yerger 576; Watson v. Wharam, 2 Term R. 80.

3. Scott's undertaking being thus shown to be collateral, he was entitled to notice of acceptance of his guaranty; and as it was shown that no notice was given him, he is not bound. Story's Con. § 873; Parsons' Con. 501; Chitty's Con. 207, note 1; Louisville Man. Co. v. Welch, 10 How. U. S. R. 461; 22 Pick. 223, 228; Lawson v. Townes, 2 Ala. 373.

4. The debt not having been paid at maturity, Scott was entitled to notice thereof, and the bringing of the suit is not sufficient notice.—Courtis v. Dennis, 7 Metcalf 518. Scott having received no notice, until after Orr had gone to Texas, he could not indemnify himself; he was discharged, therefore, because injury was done him.—Story's Con. § 874.

5. Orr gave his note, due one day after date, for the debt, and this novation or change of the debt discharged Scott.—Chitty on Contracts, pp. 528, 529; Story's Con. § 870.

6. This was not a continuing guaranty. It does not appear that Scott so intended it. The articles furnished were not only to be "little things," but such little things as Orr then—at the date of the order, and not in all time to come—needed. Plaintiffs had no right, without any notice whatever to Scott, to sell Orr goods for more than a year.—Creener v. Higginson, 1 Mason 323 (336); Rogers v. Warner, 8 Johns. 119; White v. Reed, 15 Conn. 457 (466); Whitney v. Groot, 24 Wend. 84.

7. The refusal of the court to charge that the facts, all of which are set out in the bill of exceptions, were not sufficient to show that Orr needed the articles furnished him, was wrong.—The same proof would have enabled him to set up a clothing store at Scott's expense.

8. Suppose, instead of giving the writing sued on, Scott had used the same words verbally to plaintiffs, in the presence or absence of Orr; and thereupon Orr had bought the goods, which were charged to him, and for which he afterwards settled, and then left the country. Would not the case be within the statute of frauds? and could plaintiffs recover against Scott? Parsons on Contracts, p. 499; Burge on Suretyship, p. 22; 12 Pick. 133; 4 Yerger 576; 2 Term R. 80. If this position is correct, it shows that Scott's undertaking was collateral, and

not primary. The writing does not alter the character of the transaction; it is only evidence of it.

JOSEPH R. JOHN, *contra:*

1. The instrument on which the action is founded, is not a collateral, but a direct undertaking on Scott's part to pay for the goods which Myatt & Moore might let Orr have under it. Therefore, no notice of acceptance, or demand of payment, was necessary.—Bates v. Starr, 6 Ala. 697; Oliver v. Hire & Le Baron, 14 *ib.* 250; Donley v. Camp, 22 *ib.* 659; 40 Law Lib. 37 (29).

2. The note given by Orr did not extinguish or affect Scott's liability: the note was not paid; it was not taken in satisfaction or extinguishment of Scott's liability; there was no extension of time, and no new consideration.—Muldon v. Whitlock, 1 Cow. 290, 306.

3. The contract was a continuing, as well as a direct undertaking, and bound Scott until he gave plaintiff's notice to furnish no more goods on its credit.—Pitman on Principal and Surety (40 Law Lib.), 39 (29); 2 Bouv. Inst. 59 § 1394; Parsons on Contracts, p. 508; Graham v. O'Neill, 2 Hall's Rep. 474.

4. The last charge requested was properly refused, because the court could not pass on the sufficiency of the evidence: that was a question for the jury exclusively.

GOLDTHWAITE, J.—We must hold the writing which was the foundation of this action a direct undertaking on the part of the appellant. He engages to be "good," that is, responsible, to the appellees, "for any little things Orr may stand in need of;" and under the decisions in Bates v. Starr, 6 Ala. 697, and Oliver v. Hire and LeBaron, 14 Ala. 590, the engagement was not a collateral, but a direct promise; and this being the case, no notice of acceptance, or demand of payment, was necessary.—Donley v. Camp, 22 Ala. 659; Matthews v. Christian, 12 S. & M. 595; Carson v. Hill, 1 McMullan 76; Whitney v. Groot, 24 Wend. 82.

It is urged, however, that the nature of the transaction may be determined by the circumstances; and the evidence that the goods were charged to Orr,—that the account was settled with

him,—part paid in cash, and his note taken for the residue, show that it was a collateral engagement. We agree that these facts were proper to be looked to by the jury, for the purpose of ascertaining whether credit was given to Orr alone; for the reason, that if such was the case, no recovery could be had, the plaintiffs below not having acted upon the order; and if they let the goods go without reference to it, and solely upon the credit of the party who received them, they would not be allowed, on his failure to pay, to look to an assurance which did not influence their acts. But the evidence tends to show, that the goods were sold upon the faith of the order; and the question therefore is, whether the testimony first referred to can change the legal effect of the writing, if acted on. We have found no case which goes thus far; and it would be in conflict with all the rules of law, in relation to contradicting written instruments by parol evidence. There are many cases, where the promise was a verbal one, when the acts of the parties are admitted to explain; and if equivocal expressions were used in a written undertaking, then it would be open to explanation. This was, in effect, the reasoning of Bayley, J., in Simpson v. Penton, 2 Cromp. & Mees. 430; but here, under the force of our own decisions, we are bound to construe the writing as an original undertaking; there is no ambiguity, and that being the case, the only inquiry is, has it been acted upon by the appellees? If they parted with the goods on the faith of it, it makes no difference to whom they were charged, as the rights of the parties must be determined by the writing; and the fact that it was treated by those to whom it was addressed as a collateral, instead of a direct undertaking, cannot change it into the former. It follows from what we have said, that the payment by Orr of a part in cash, and giving his note for the balance, did not affect the liability of the appellant for the amount remaining unpaid, unless the note was received in satisfaction of the balance due; and of this, the mere taking of the note was not sufficient evidence.—Abercrombie v. Mosely, 9 Port. 145; Muldon v. Whitlock, 1 Cowen 290; Edwards v. Deifendorf, 5 Barb. Sup. Ct. 398; Johnson v. Cleaves, 15 N. H. 332; Gordon v. Price, 10 Ired. 385.

Neither do we think that the words can fairly be supposed to mean, that Orr was only to have such articles as he actually

stood in need of. We are not tied down to a strict and literal interpretation of instruments of this character, but must adopt the construction which, without forcing or doing violence to the language used, ascribes the most reasonable, probable and natural conduct to the parties, (Bell v. Bruen, 1 How. Sup. Ct. 169, 186); and it is not to be supposed, that when a man gives an order like this, the other party is bound to inquire, and ascertain with certainty, before he acts upon it, whether the person in whose favor it is given absolutely needs the goods. A just and reasonable construction of the terms of the order, in our opinion, would extend it to any articles of no great value, which would come under the denomination of necessaries for one in the condition of Orr; and as the account included articles of clothing, a general charge that a recovery could not be had for the items of the account, would have been improper.

The only remaining question is, whether the writing is continuing in its character. The words are, "let the bearer, Mr. Orr, have any little things he may stand in need of, and I shall be good for the same." It is limited in two particulars; and had the promisor intended to have confined it to such articles as Orr required at the time it was drawn or presented, he should have used words which would have expressed his intention more clearly. The rule is, that where the language is susceptible of two meanings, it should be taken most strongly against the guarantor, and in favor of the party who has parted with his property upon the faith of the interpretation most favorable to his rights.—2 How. Sup. Ct. 426, 450, and cases there cited. Here, as we have said, the accountability of the appellant is limited in two respects; but there are no words of limitation as to the time it is to continue. The articles to be supplied are those which Orr "may stand in need of;" and the word "may" can certainly as appropriately be referred to the future, as the present wants. Such, we think, would be the ordinary understanding, and upon any other construction it would be liable to mislead. We must, for these reasons, hold the order as continuing, until the account was closed, or the order revoked by the appellant.

The judgment is affirmed.

PRATER'S ADM'R *vs.* DARBY.

1. In civil cases, no errors will be noticed which are not assigned.
2. An absolute bill of sale of slaves, and a bond executed contemporaneously by the vendee (to his vendor) conditioned that he shall emancipate them, must be considered together as forming but on agreement.
3. The owner of certain slaves, being about to remove with them to Illinois for the purpose of emancipating them, conveyed them by absolute bill of sale to another, and took from him at the same time a bond, conditioned that he should emancipate them when reasonable compensation had been made to him for his trouble and expenses with them: *Held*, that inasmuch as there was nothing on the face of the bond requiring the obligor to emancipate the slaves in this State, his undertaking was not void, but formed a sufficient consideration for the bill of sale.
4. The case of Trotter v. Blocker and Wife, 6 Porter 269, overruled, as to the principle stated in the first clause of the fifth head-note, which asserts that the constitutional delegation of authority to the Legislature "to pass laws to permit the owners of slaves to emancipate them," "*is equivalent to a positive inhibition of the right of the owner to emancipate them except only under such regulations as the Legislature may prescribe.*

ERROR to the Circuit Court of Lauderdale.

Tried before the Hon. THOMAS A. WALKER.

DETINUE for certain slaves, by the administrator of Martha Prater, deceased, against Drucilla Darby. The pleas were, the general issue and the statute of limitations. It is unnecessary to notice the other pleadings, as they have no connection with the errors assigned, which only relate to the matters shown by the bill of exceptions.

"The evidence showed, that on the 14th of January, 1826, in Lauderdale County, Alabama, and at the same time and place, the plaintiff's intestate, Martha Prater, and one Richard Darby, respectively executed and delivered the following instruments:

"STATE OF ALABAMA, } Received of Richard Darby five
Lauderdale County. } hundred and twenty-five dollars, in notes, for a negro woman named Rachel, about twenty-five years of age, and her three children, Eliza, about eight years of age, William, about five years of age, Thomas, about three years of age; the right and title of said negroes sold, warranted and de-

fended forever, against myself, my heirs, executors, administrators, and all other persons whatsoever. Witness my hand and seal, January 14th, 1826.

Test. JOSEPH PHILLIPS, THOMAS M. PHILLIPS. MARTHA her ⋊ mark PRATER."

"Know all men by these presents, that I, Richard Darby, of the State of Alabama, and County of Lauderdale, am held and firmly bound, in the penal sum of one thousand and fifty dollars, well and truly to be made to Martha Prater. I bind my heirs, executors, administrators and assigns, firmly by these presents. Sealed with seal, and dated this 14th of January, 1826.

"The condition of the above obligation is such, that if the above bound Richard Darby doth liberate and set free a certain negro woman, named Rachel, and her children, when a reasonable compensation is made to the above bound Darby for his trouble and expenses that the said Darby is at with the above named negro woman and her children, then the above obligation to be void; otherwise, to remain in full force and virtue.

Signed, sealed, and delivered in presence of us, the day and date above written. } RICHARD DARBY. [Seal.]

Test. JOSEPH PHILLIPS, THOS. M. PHILLIPS.

"The proof showed, also, that the negroes mentioned in said bond and bill of sale, who then, and for a long time prior thereto, had belonged to Martha Prater, were then delivered to said Richard Darby, and continued in his possession until he died in December, 1834; that the negroes sued for are the negroes named in said bond and bill of sale, and are in the possession of the defendant, who obtained them through the will of said Richard Darby," which contains the following clause in relation to them: "And I give her (his wife Drucilla) my three negroes, viz., Lige, William and Tom, to labor for her support and the benefit of my children; and I also give her my crop on hand; all of said several bequeaths and gifts to be held and enjoyed by her during her natural life, and after her death an equal division to be made of all that she leaves among all my children." * * "And it is my desire that each of my negro boys, viz., Lige, William and Tom, be emancipated at the age of twenty-eight years; to be effected in that manner which my executors can justifiably and lawfully do."

"There was evidence, also, tending to show that, at the time and place when and where said instruments were executed, and after their execution, a twenty dollar Bank note was handed by said Richard Darby to Martha Prater, for which she handed over, and delivered up to him, his promissory note to her for about $500. There was evidence, also, though not clear and conclusive, that the said twenty dollar note was, in fact, Mrs. Prater's own money, and not the property of said Darby. The proof showed, that Mrs. Prater, prior to said 14th of January, 1826, and at that time, owned a number of slaves; that she had entertained a fixed and frequently expressed purpose of emancipating them; that, at the time said contracts above specified were made, she was on the eve of leaving this State for Illinois, with the view, and for the purpose, of effecting her design to emancipate them; that said woman Rachel had, at that time, a husband in this county, who belonged to some other person residing here; that Mrs. Prater left for Illinois on said 14th of January, 1826, and remained there until her death in 1834; that no administration was granted on her estate, in this State, until 1844; that said Richard Darby died in this county, in December, 1834. There was proof tending to show declarations, made by said Darby long subsequent to the date of said contracts, to the effect that he intended to free said negroes, and to carry out his contract with Mrs. Prater in good faith. There was, also, evidence tending to show that, according to the cotemporaneous understanding and agreement of the parties, the said Darby was to be compensated for his trouble and expense in raising and freeing said slaves by their services."

"The court charged the jury as follows: If the jury believe from the proof that Martha Prater was of sound mind, and voluntarily made, executed and delivered the negroes and bill of sale read in evidence to Richard Darby, and under this sale and contract said Darby held the uninterrupted possession of said negroes, from January 14, 1826, to 1834, the year when both Martha Prater and said Darby died, then plaintiff, as administrator of Martha Prater, cannot recover in this action, notwithstanding said Darby did execute said bond at the same time, by which he obligated himself to set the negroes free according to the terms of said bond. The court stated to the jury, before

and at the time this charge was given, that the same was given with reference to, and in view of, all the facts occurring at the time said instruments were executed, including the evidence in relation to the payment of money, the taking of a note, &c.; and plaintiff thereupon excepted to said charge."

"The plaintiff then requested the court to charge, that, if said bond and bill of sale were executed at the same time and place, they constitute but one contract; and if only $20 was paid by Darby to Mrs. Prater, and the jury believe that that sum, in fact, belonged to Mrs. Prater, and not to Darby, then the contract between the parties was illegal and void, and plaintiff is entitled to recover, unless barred by the statute of limitations; which charge the court refused to give, and charged the jury, instead thereof, 'that said instruments, if executed at the same time and place, did constitute but one contract; and taking the same in connection with all the evidence of facts occurring at the time, if the proof showed Darby's continuous possession of the negroes for six years, from January 14, 1826, to 1834, then plaintiff cannot recover.' To this charge, and to the refusal to charge as requested, plaintiff excepted.

"The plaintiff then requested the court to charge, that, if the jury believe from the evidence that the only money paid by said Darby to Mrs. Prater was $20, then this small amount, when contrasted with the value of the slaves transferred, and when connected with said Darby's bond, if that bond was executed at the same time with the bill of sale, shows that the contract was not a valid bargain and sale of the negroes, but was an illegal and void contract; which charge the court refused, and plaintiff thereupon excepted.

"The plaintiff then asked the court to charge, that, if the jury believe from the evidence that, at the time said bond and bill of sale were made, said Darby's note for about $500 was taken up by $20, then paid by said Darby, and that said note was given as the consideration of said bill of sale, and that said $20, in fact, belonged to Mrs. Prater, then the statute of limitations did not begin to run, until Darby did some act evincing his intention to hold said negroes absolutely as his own property, and discharged of any obligation to emancipate them; which charge the court refused to give, and plaintiff excepted to the refusal.

"The plaintiff then requested the court to charge, that, if the jury believe from the evidence that said bill of sale and said bond were executed at the same time, and were delivered by the parties respectively as part and parcel of the same contract, and Darby's said bond was the only consideration for said bill of sale, and that Darby was to be compensated for his trouble and expenses in freeing said slaves, by their services, then said contract was void, and plaintiff must recover unless barred by the statute of limitations; which charge the court refused, and plaintiff excepted."

The only error assigned is, that the court erred as shown by the bill of exceptions.

L. P. & R. W. Walker, for plaintiff in error:

1. Mrs. Prater's bill of sale and Darby's bond constitute but one agreement, and are to be construed together.—1 Green. Ev. p. 321; 3 Phil. Ev. 1421; 8 Ala. 375; 9 *ib.* 24; 2 Denio 129. The two instruments together show the conditional character of the delivery; and then the parol evidence shows that the money consideration was less than that recited in the bill of sale. That the parol evidence was admissible, to show that the written instrument was altogether void, or that it never had any binding efficacy, see Corbin v. Sistrunk, 19 Ala. 203; Dixon v. Barclay, 22 *ib.* 378. And that the acknowledgment in the bill of sale, as to the consideration, is considered as a receipt for money merely, and therefore open to explanation by parol proof, see 5 Ala. 224; 8 *ib.* 24; 12 *ib.* 678. The contract being thus explained by the parol proof, we must look, in ascertaining the intention of the parties, to the subject-matter of the contract, the situation of the parties, the motives that led to it, and the object to be obtained by it.—Watts, ex'r, v. Sheppard, 2 Ala. 425. Thus viewed, it is clear that it was the intention of the parties to free the negroes, and that they sought to consummate this object by the contract entered into. The sale of the negroes did not constitute a substantial contract, distinct from Darby's obligation to manumit them; the sale and the stipulation to free them were both provided for in the agreement, and had reference to each other, the one depending on the other. The bill of sale and the obligation to free the slaves constitute distinct transactions provided for by one entire contract.—2 Stewart 196.

2. Such a contract is void, because of illegality. The first article of the constitution, in regard to slaves, amounts to an inhibition of the owner's right to emancipate them, except only under such regulations as the Legislature may prescribe.—6 Porter 269, 292; 13 Ala. 105; 18 *ib.* 515. In 1826, when this contract was made, no such regulations had been prescribed; and this contract must be construed in reference to laws then existing, and to no subsequent changes.—Alston v. Coleman, 7 Ala. 795. It is not necessary that a law should contain prohibitory terms, or impose a penalty, to make a contract in violation of it void.—6 Ala. 21; 9 *ib.* 198; 13 *ib.* 105; 1 Conn. R. 502; 19 Johns. 311. The contract was also against public policy, and therefore void.—2 Stewart 175; 6 Ala. 20; Chitty's Con. 519; 11 Wheat. 261, 271.

3. Being thus void for illegality, and as contravening public policy, the plaintiff can recover everything advanced upon it. There is a *locus penitentiæ*, and right of rescission and action. Being void, the contract did not divest plaintiff's title.—9 Porter 154; 3 Ala. 37. No change of property was effected by the contract; the plaintiff might have reclaimed it, and defendant could not have been compelled to keep it and perform his agreement with reference to it.—10 Ala. 569; 11 *ib.* 659; 2 Green. Ev. § 111; 7 Porter 251; 2 Stewart 126.

4. The maxim, that where there is an executed illegal contract, and the parties are *in pari delicto*, the law will not interfere, does not apply.—1 Ala. 450; 7 *ib.* 357. The contract here is not executed. An executed contract is where the illegal act agreed on has been fully performed—where the *delictum* is complete.—Broom's Legal Maxims, top p. 210; 7 Porter 251; 10 Ala. 567; 11 *ib.* 535, 656; 9 Porter 151, 227, 229; 11 Johns. 25; Chitty's Con. 637; 2 Doug. R. (4th ed.) 697. The parties are not *in pari delicto*.—7 Porter 256; 7 Johns. 433. The plaintiff committed no crime in making the contract. It is not *malum in se*. The maxim, therefore, does not apply. The contract is simply void on principles of public policy; and in all such cases, although the contract may be executed, as the parties do not stand technically *in pari delicto*, the plaintiff is entitled to recover.—7 Johns. 433; Jacques v. Golightly, 2 Black. R. 1073; 7 Term R. 535. In Vischer v. Yates, 11 Johns. 29, C. J. Kent says: "The courts take a

distinction between contracts that are immoral and criminal, and such as are simply illegal and void. Assistance is given to the party in the latter case to recover back his money." The same point is decided by Lord Kenyon, in almost the same language, in Munt v. Stokes, 4 Term R. 561. Where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, such an action can never be maintained; but where the action is in disaffirmance of the contract, and seeks to prevent the defendant from retaining the benefit derived from an unlawful act, the plaintiff can recover.—2 Com. Contracts, p. 109, cited in 8 Cowen 24.

5. The statute of limitations is no bar, unless Darby and his executor have been in the adverse possession of the slaves for six years since the cause of action accrued. But Darby's possession was not adverse; the contract of sale, being against public policy, was but a bailment: no title passed to Darby under it (see authorities cited in third paragraph, *supra*). He was, therefore, Mrs. Prater's bailee, or trustee, *sub modo*; and until a trustee does some act evincing his intention to annul the trust or bailment, and to convert the property to his own use, the possession is not adverse.—8 Porter 222; 11 Ala. 1043; 5 *ib.* 90, 407; 3 Yerger 211; 4 *ib.* 104. That this contract, though illegal, created a bailment or trust, see 6 Ala. 345, 589, 600; 7 Porter 256; 4 Kent's Com. 306; 1 Dev. & Bat. Law R. 336, 479; 2 *ib.* 115. The case of Hill v. Hughes, 1 Dev. & Bat. 336, was the gift of a slave by parol, whereas the act of 1806 declared that no gift of a slave should be good unless made in writing; and the court held, that the gift by parol operated as a bailment simply, and that no length of possession, under such gift, would raise a presumption of title in the bailee. The case in 1 Dev. & Bat. 479, reported again in 2 *ib.* 115, is a stronger case, both on the point of bailment and the statute of limitations. In these cases, the gift was illegal, as contravening an express statute; in the case at bar, the contract is void, because against public policy. In neither case, therefore, did the title pass; and defendant, being in possession by sufferance, must be considered as holding under a bailment. But, in addition to this, the proof shows that the bailment was always admitted by Darby, and was recognized in his will. No

adverse holding, in the proper sense of that term, was ever asserted or proved. Applying these principles to the charge of the court, it was clearly calculated to mislead the jury; for it asserted, in effect, that the plaintiff could not recover, if Darby had been six years in possession, no matter what may have been the facts occurring at the time the instruments were executed under which they went into his possession.

WILLIAM COOPER, *contra:*

Darby took the slaves absolutely, and plaintiff has no right to recover. The condition to liberate the slaves is void; yet Darby may remove them from this State and liberate them.—Atwood's Case, 21 Ala. 590; Black & Manning v. Oliver, 1 *ib.* 449, where the vendee of a slave woman gave bond to marry and liberate her, and this court held that he took her unencumbered. This last case has been recognized and affirmed in principle, in Corprew v. Arthur, 15 Ala. 531, where it is ruled, "that when the parties are in equal fault, in making an illegal contract, better is the condition of him in possession," and the law will aid neither touching the contract.—Boyd v. Barclay, 1 Ala. 34; 2 Stewart 175; Hopper, adm'r, v. Steele, 18 Ala. 831; Burt v. Place, 6 Cowen 431; 8 Barb. S. C. R. 449; 7 Sm. & Mar. 380; 4 Peters 184; 11 Mass. 368; 8 Sm. & Mar. 624.

In answer to the above position, Terrel's counsel relies upon the decision of this court in 11 Ala. 659; but that case does not conflict with our position; it does not, on its face, purport to overrule the cases above cited, and the principle asserted in it does not conflict with the principles of those cases. In suits respecting lands, whoever sets up title must hold it by written documents; and if they are void by statute, of course his defence fails. But this is not the case with regard to personal property; slaves, for example, are taken by delivery, and held by oral title, and need no paper title; and the case in 11 Ala. (p. 659) is expressly put on the ground, that the deed being void, the title still remained with the grantor. Money loaned usuriously cannot be recovered back.—5 Johns. Ch. 142; 2 Story's Eq. 300.

The idea that there is a *locus penitentiæ*, at which one *in pari delicto* can retrace his steps, and have back what he has illegally

disposed of, under the assumption of a trust or bailment, is wholly untenable in this case. In the case of Rochell v. Harrison, 8 Porter 352, the owner of slaves conveyed them, in fraud of creditors, and contrary to statute; yet it was held, that the title passed by delivery of possession, and that the vendee should hold them against his vendor.—11 Mass. 375; 8 Johns. 515; 18 Ala. 831.

There is here no distinction between *malum in se* and *malum prohibitum*: all are void, being illegal, and the same rule obtains as to *pari delicto*.—1 Ala. 34; *ib.* 449; 15 *ib.* 553; 18 *ib.* 828; 6 *ib.* 16; Pennington & Kean v. Townsend, 7 Wend. 280; 20 Johns. 397; U. S. Bank v. Owen, 2 Peters 527; 7 Johns. 433; 8 Cowen 20; *ib.* 195; 1 Parsons on Contracts, p. 382, and note (a); Jackson v. Walker, 5 Hill (N. Y.) 27.

No consideration was necessary from Darby, as she had a right to make a voluntary conveyance of the slaves. But the $500 paid is a sufficient consideration, and estops her and her administrator. Judge Story decided, that one dollar was enough to bind a grantor to the amount of upwards of $40,000; and that, if the one dollar had not been paid, the grantor had a right to it, and might have it by suit.—Lawrence v. McAlmont, 2 How. (U. S.) 426; 7 Vesey 249; 10 *ib.* 470; 7 *ib.* 34.

Darby held adversely to Mrs. Prater. All who hold by deed absolute, hold against the *vendee*; bare possession and claim of right, without deed, is adverse.—Herbert v. Hanrick, 16 Ala. 595; Hinton v. Nelms, 13 *ib.* 222; Abercrombie v. Baldwin, 15 Ala. 363; 24 Wend. 587.

If Mrs. Prater had the right to repudiate her deed of sale to Darby (which we do not concede), she should have done so within six years from the date of the conveyance, or she was barred by the statute of limitations.—Howell v. Hair, 15 Ala. 194; Powell v. Wragg & Stewart, 13 *ib.* 161; Sims v. Canfield, 2 *ib.* 561; 11 Wheat. 361; 5 Cranch 358; 24 Wend. 587; Humphrey v. Terrell, 1 Ala. 650; Brown v. Brown, 5 *ib.* 508; Williams v. Harvey, 3 *ib.* 371.

The charge of the court below, therefore, was correct.

CHILTON, C. J.—Several questions have been argued by the counsel in this case, which are not presented by

the assignment of errors. The rule which has uniformly obtained in this court, in civil cases, is, that no errors will be noticed which are not assigned. Confining ourselves to the matter presented by the bill of exceptions, which alone is insisted upon by the plaintiff in error as erroneous, we proceed at once to consider the nature of the agreement entered into between Mrs. Prater and Richard Darby.

1. The bill of sale made by Mrs. Prater, and the bond executed by Darby to her, referring to the same subject-matter, and executed at the same time between the parties, must be considered together, and as forming but one agreement. What is its legal effect?

The respective counsel for both the parties concede, that it is void, but they arrive at opposite conclusions as to the legal consequences growing out of it; for the plaintiff's counsel insists, that, being void and executory, the title remained in Mrs. Prater, and may be asserted by her administrator; while, on the other hand, the counsel for the defendant contends, that both parties being equally in the wrong, the condition of the possessor is the better.

We have carefully considered the nature of the two instruments taken together, and in connection with the surrounding circumstances, and we are satisfied that both the counsel have misconceived the legal effect of the agreement. Its validity depends upon whether the undertaking of Darby to free the slaves, was legal; for, if this be valid, it forms, of itself, a valid consideration for the bill of sale. There would then be a promise for a promise, or rather, mutual obligations, under seal, entered into by the parties, the one constituting the consideration for the other. We repeat, if the undertaking of Darby was valid, there can be no question that it formed a sufficient consideration for the bill of sale.

There is nothing on the face of Darby's bond which requires him to free the slaves *in this State;* the undertaking is general, and consequently embraces any and every mode by which it might lawfully be effected. If, then, he might in any way have lawfully carried out the undertaking to emancipate, we must intend that that mode was in the contemplation of the parties; for the rules of construction

require, that where an agreement admits of two interpretations, we must give it that which makes it avail, "*ut res magis valeat, quam pereat.*" The parties, doubtless, were aware that the slaves could not be liberated in this State; otherwise, Mrs. Prater would at once have emancipated them. They were, moreover, apprised that this could be done by their removal to a free State; for, with a view of accomplishing that very object, Mrs. Prater was then on the eve of removing to the State of Illinois, and left on the day the agreement was entered into.

It cannot be denied, that Mrs. Prater could have taken the slaves with her, and have liberated them in any State whose laws did not forbid it; neither will it be controverted, that she could have retained and worked them until they attained the respective ages of 28 years, and then have sent them to Liberia, or elsewhere, so as to have effected their emancipation. If she could have done this herself, why could she not do it by another?

We had occasion to examine this question very fully in the case of Atwood's Heirs v. Atwood's Ex'r, 21 Ala. 590, and there held, that there was nothing, either in the constitution or laws of this State, forbidding the emancipation of slaves by their removal to a non-slaveholding State.

This view disposes of the case; for the charges asked and refused by the court are based upon the erroneous idea that the bill of sale and bond, when construed together as constituting but one agreement, are void.

It will be observed, that this is not an attempt on the part of Mrs. Prater to vest any rights *in the slaves* to their freedom; and the agreement, therefore, is not obnoxious to those decisions which hold that contracts and bequests of that character are void by reason of the slave's incapacity to take.

We have been cited to the case of Trotter, adm'r &c., v. Blocker and Wife, 6 Port. 260, as an authority to prove that, in virtue of the constitutional provisions in regard to the right of emancipation, this right is entirely denied to the citizen, except as it may be conferred by the Legislature.

It is conceded in that case, "that the owner of property is free to relinquish his right to it, at pleasure, as a general proposition; and the manner of relinquishment, in the absence

of legal restraints, must be left to his discretion." It was further conceded, that, at common law, the owner possessed the right of setting at liberty his slaves. But it was held, that the constitutional provision, which declares that the General Assembly "shall have power to pass laws to permit the owners of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming a public charge," was a clear delegation of authority to the Legislature, to regulate by law the emancipation of slaves, "*and is quite as potent as if it contained negative terms, inhibiting the exercise of such a right, but in obedience to the expressed will of the General Assembly.*" If this construction be correct, it would seem to follow, that every conceivable mode of emancipation, other than such as the Legislature may confer, is prohibited by the fundamental law.

We have examined this subject with much care, and, although reluctant to depart from a decision upon so grave a constitutional question, yet we are unable to perceive any just rule of construction which warrants such interpretation; and, as it might lead to infinite mischief, if carried out in all its bearing in reference to the State and Federal constitutions, we feel constrained to dissent from it, and, as to so much of that decision as is expressed in the first clause of the fifth head-note, to overrule it.

A few observations may serve to show the incorrectness of the construction given by the court to the constitution in that case; and, first, it may be observed, that it would appear somewhat improbable that the people, the true source of power in a republican government, should yield up to one of the departments of the State a natural, common-law right, thus making themselves ever afterwards dependent upon the Legislature to re-invest them with it.

In the next place, we deem it too clear to admit of argument, that power given to the General Assembly to legislate upon certain rights, so as to control their exercise or enjoyment, cannot be construed legitimately into an abrogation of such rights. There is no such repugnance between constitutional liberty and common-law rights, as that the bare mention of the latter in the fundamental laws of the State, as proper subject-matter for legislation, should be tantamount to an express

negation of them. If the construction there given be correct, then the eighteenth section of the sixth article, which makes it the duty of the Legislature to pass laws for settling differences by arbitration, in the absence of such laws, strikes down the right which the people possess of adjusting difficulties in this way.

The same rule, when applied to the Federal constitution, would inhibit the State from providing for the punishment of counterfeiters of the current coin of the Union, and would make the States of the Union dependent upon the Federal Government for their republican forms of government, and deny to them the right of self-preservation and protection; since the Federal constitution confers upon Congresss power to provide punishment for counterfeiting the coin of the United States, and the United States guaranties to each State a republican form of government, and protection against invasion and domestic violence, &c.

The view we have taken is conclusive of the case, and sh ows that there are no errors in the bill of exceptions prejudicial to the plaintiff in error.

Let the judgment be affirmed.

ELLIOT *vs.* DOE Ex Dem. EDDINS.

1. Where lands are sold for taxes under the act of 1848 (Pamphlet Acts 1847-8, p. 21), the omission to observe all the requisitions of the statute, as to the advertisement &c., is fatal to the purchaser's title, although his deed may contain all the recitals enumerated in the sixty-seventh section of the act.

Appeal from the Circuit Court of Tuskaloosa.

Tried before the Hon. Turner Reavis.

Ejectment for the west half of the north-west quarter of section seventeen, in township twenty-three, range four, east. The facts sufficiently appear in the opinion.

E. W. Peck, for the appellant.

Ormond & Nicolson, *contra*.

GOLDTHWAITE, J.—The lessor of the plaintiff below deduced his title from the patentee of the land, by deed duly executed on the 15th October, 1850; and there is nothing in the record to show that this deed was void by reason of the adverse possession of Elliott at the time of its execution. The only question, therefore, is as to the validity of the tax title, which the defendant relied upon in the court below. This title rests upon the act of 6th March, 1848, which requires, amongst other things, that the lands on which taxes are not paid shall be advertised at the court-house door of the county in which the lands lie, as well as in a newspaper; and that the advertisement should show not only the amount of taxes due, but all expenses, including the costs of advertising.—Acts 1847, p. 21. Neither of these requisitions was complied with in this case, and under our decisions, the omission was fatal.—Pope v. Headon, 5 Ala. 433; Lyon v. Hunt, 11 Ala. 295; Scales v. Alvis, 12 Ala. 617.

It has been insisted by the counsel for the defendant in error, that, as the deed made by the tax collector contains the recitals mentioned in the 67th section of the act, it takes the case out of the rules usually applicable to this class of cases. It is true, the section referred to says, that the deed with these recitals shall convey all the title of the owner, legal or equitable; but we are inclined to think, that inasmuch as the statute requires the deed to contain these recitals, the true meaning is, that, in addition to the other requisites, a deed containing these recitals is necessary; it may have been the intention of the Legislature, to make the deed *prima facie* evidence of the facts contained in the recitals. However this may be, it is unnecessary to decide upon the present record, as we cannot suppose that it could have been the intention of the Legislature to divest the title of the owner, when none of the conditions of the statute had been complied with, except the making of the deed.

Judgment affirmed.

TATE *vs.* SHACKELFORD'S ADM'R.

1. The character in which a party sues must be determined from the body of the declaration, and not from his description of himself in its caption. If, therefore, he describes himself as administrator in right of his wife, and declares on a right of action accruing to him individually, he must be regarded as suing in his individual capacity, and the superadded words must be held a mere *descriptio personæ*; and upon his death, in such case, the suit should be revived in the name of his personal representative.

ERROR to the Circuit Court of Cherokee.

Tried before the Hon. L. P. WALKER.

WHITE & PARSONS, for plaintiff in error.

J. B. MARTIN, *contra.*

CHILTON, C. J.—William A. Shackelford sued the plaintiff in error before a justice of the peace, and in the warrant he is described, "administrator, in right of his wife, of the estate of George W. Hail, late of Cherokee county, deceased."

The cause of action endorsed on the warrant, as also that declared upon in the Circuit Court, to which the case was taken by appeal, is a special contract, made between Shackelford and Mrs. Tate, for the services of a slave, belonging to Hail's estate, in the erection of a boat, for which service she was to pay the plaintiff below the sum of $52 50. The sum of two dollars and fifty cents was credited on the demand.

Shackelford having died since this writ of error was sued out, his administrator has been made a party; and it is insisted by the plaintiff in error, that the suit should abate, because Shackelford having sued as administrator, in right of his wife, of Hail's estate, no interest in the subject matter of the suit can survive to his administrator.

The character in which a party sues must be determined, not from the description of himself, which he gives in the caption of the declaration, but from the body of the pleading; in other words, although the plaintiff may describe himself as administrator, yet, if he aver a right of action as an individual, which

does not accrue to him in a fiduciary character, he is to be regarded as suing in his individual capacity, and the superadded words "administrator," &c., are regarded as descriptive of the person.

So, in Arrington v. Hare, 19 Ala. 243, we held, that where a plaintiff styles himself executor or administrator, and declares on a note payable to himself in that capacity, but the declaration does not aver that the note was assets of the estate, the words "executor &c." are a *descriptio personæ*, and on the death of the plaintiff, the suit is properly revived in the name of his personal representative. This case, and the authorities there cited, very clearly show that Shackelford must be regarded as suing in his individual right, and that, upon his death, the suit may properly be revived in the name of his personal representative.

Let the judgment be affirmed.

NAPIER ET AL. *vs.* BARRY.

1. In trover for the conversion of a slave, a witness who, as agent of plaintiff, brought the slave to this State, is competent to prove his own agency; and although his testimony also tends to show that the slave was sold under attachment against himself, sued out by defendant, this does not render him incompetent, if there is no evidence showing that he consented to the levy or sale.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. JOHN E. MOORE.

TROVER for the conversion of a slave, by William T. Barry against John S. Napier and John Weatherford. On the trial, the plaintiff offered in evidence the deposition of a witness, who testified, that he, as agent of plaintiff, brought the slave from Mississippi to Lawrence County, Alabama; and his testimony tended to prove, also, that the slave was sold under attachment against himself, sued out by the defendants. The defendants

objected to the reading of this deposition, but their objection was overruled; to which ruling of the court they excepted, and which they now assign for error.

L. P. WALKER, for the appellants.

LEMUEL COOK, *contra*.

GOLDTHWAITE, J.—There is no error in the record.—The witness was competent, in the present case, to prove his own agency (Green. Ev. § 416); and conceding that the deposition established the fact, that the slave was sold under attachment against the witness, there is no evidence to show that he consented to the levy or sale, and the case is thus brought directly within the principle of Bush v. McGee, 4 Ala. 710. Having no interest which would disqualify him, no release was necessary.

The judgment is affirmed.

SPENCER, ADM'R, *vs.* THOMPSON AND WIFE.

1. When an appeal is taken under the Code, and security for costs merely is given, it is only necessary that the surety should acknowledge himself liable for the costs of the appeal as under the old practice; but if a bond is given to supersede the judgment (§§ 3019, 3041), it is the duty of the clerk to send up a copy of it with the record (§ 3032). When the clerk merely certifies that the appellant "has given bond, with A. B. security for said appeal," and does not send up a copy of the bond, the appeal will be dismissed on motion.

APPEAL from the Court of Probate of Tuskaloosa.

MOTION to dismiss the appeal. The clerk certifies, in his final certificate, "that said James C. Spencer gave bond, with Humphrey B. Rogers his security for said appeal"; but no copy of the bond appears in the transcript.

E. W. PECK, for the motion.

ORMOND & NICOLSON, *contra*.

CHILTON, C. J.—When security for costs merely is given, under the provisions of the Code, it is only necessary that the surety should acknowledge himself as such for the cost of the appeal in the particular case, as under the old practice. No formal bond was contemplated by the Legislature, except in cases where the judgment was to be superseded as specified in sections 3019 and 3041. If a *supersedeas* bond has been taken, it is made the duty of the clerk to send up a copy of it with the record.—See Code, § 3022.

In these cases, the clerk says a bond was taken, but no copy of it appears of record; neither are we informed as to the character of the bond, so that it is impossible for us to say whether it is such as furnishes security for the cost; and as the counsel for the appellant declines a *certiorari*, the appeal for this cause must be dismissed.

WALTON, ADM'R, *vs.* BONHAM ET AL.

1. A vendee may come into equity, to enjoin a judgment at law on the notes given for the purchase money, upon alleging the vendor's fraudulent representations of title in himself, a breach of his warranty of title, and the insolvency of his estate.
2. A deed made to hinder, delay and defraud creditors, can only be declared void when attacked for the fraud; neither the grantor himself, nor his administrator, can set up the fraud against a subsequent purchaser from him, for the purpose of showing that a good title passed notwithstanding the deed, and thus preventing the purchaser from enjoining a judgment at law on the notes given for the purchase money.

APPEAL from the Circuit Court of Montgomery.

Heard before the Hon. J. W. LESESNE.

THE appellees filed this bill to enjoin a judgment at law, recovered against them by the appellant, as the administrator

of Samuel Humphries, deceased, on a note given for the purchase money of a certain tract of land, sold by said Humphries to complainant Bonham in 1846, on which note the other complainants were said Bonham's sureties. The bill alleges, that said Humphries fraudulently represented to said Bonham that he had a perfect title to said land, and conveyed the same to him by deed with warranty of title; that Bonham has paid part of the purchase money, and has made improvements on the land, and has opened thirty acres of it for cultivation; that judgment has been rendered against complainants for the balance of the purchase money remaining unpaid; that Bonham has discovered since the rendition of said judgment, that said Humphries, at the time of said sale, had not the legal title to said land, but had previously conveyed it, by deed duly recorded, bearing date February 6, 1839, to his infant children; and that the estate of said Humphries is insolvent.

The administrator answered the bill, admitting its material allegations, and setting up, in bar of the relief sought, that said conveyance executed by his intestate to his minor children, was so executed by him for the purpose of hindering, delaying and defrauding his creditors, and was therefore void, and consequently a good title passed to said Bonham by his purchase.

The Chancellor decreed in favor of complainants; holding that Humphries, if alive, could not set up his own fraud, and that the same disability rested on his administrator; and citing Roden v. Murphy, 10 Ala. 804, and Marler v. Marler, 6 Ala. 367. This decree is now assigned for error.

NAT. HARRIS, for the appellant.
GEORGE W. STONE, *contra*.

GOLDTHWAITE, J.—The equity of the bill rests upon the allegations of the sale of land by Humphries, the intestate of the defendant, to the complainant, with warranty of title; the fraudulent representations on the part of the vendor that he had the title at the time of the conveyance, when, in fact, he had not, by reason of his conveyance to his children before that time; and the insolvency of his estate, which renders it unable to respond in damages. These allegations are sufficient to sustain the bill.—Young v. Harris, 2 Ala. 108; Spence v. Driver, 3 Ala. 251; Greenlee v. Gaines, 13 Ala. 198.

The appellant proves that the deed to the children was made to defraud creditors, and sets up the fraud of his intestate in order to defeat that deed, and thus sustain the title to the complainant. This cannot be done. The law holds the deed void, as against creditors and purchasers; but it can only be so declared when it is attacked for the fraud. Here the deed is not assailed by the purchaser. He assumes, as he has a right to do, that it is honest, and a court of justice will not allow the party who made it to say that it was fraudulent. To do so, would be against good morals; and the grantor, under such circumstances, not being permitted to impeach his own deed, his administrator cannot do so.—Marler v. Marler, 6 Ala. 367; Roden v. Murphy, 10 Ala. 804.

Decree affirmed.

HAMILTON, ADM'R, *vs.* GWYNN AND WIFE.

1. A writ of error does not lie from a decree of the Court of Probate, purporting to have been rendered on the final settlement of an estate, and reciting that the administrator "moved the court to be discharged on the grounds of payment and delivery of the property in his hands to the heirs; which motion being argued by counsel on both sides, and due deliberation had thereon by the court, it is considered by the court that the testimony is not sufficient to discharge the adminstrator."

ERROR to the Court of Probate of Clarke.

THE plaintiff in error was cited by the defendants to make final settlement of his administration on the estate of Linda Hamilton, deceased. After several continuances, a decree was rendered, which is entitled "In the matter of the estate of Linda Hamilton, deceased," and is as follows: "This being the day to which the final settlement of the estate of Linda Hamilton, deceased, was postponed, the cause came up for hearing; and the said administrator, having previously filed his account current for final settlement, now moves the court to be dis-

charged, on the grounds of payment and delivery of the property and negroes in his hands belonging to said estate to the heirs;" the decree then sets out the testimony adduced on the motion, and concludes thus: "which motion being argued by counsel on both sides, and due deliberation had thereon by the court, it is considered by the court that the testimony is not sufficient to discharge the said administrator; to which ruling of the court the administrator excepts," &c. A motion is now made to dismiss the writ of error.

F. S. Blount, for the motion.

CHILTON, C. J.—In this case, a motion is submitted to dismiss the writ of error, for the reason that the record shows that no final judgment was rendered in the cause. Upon an examination of the record, we are satisfied that the motion should be allowed. The Probate Court refused to discharge the administrator on his motion; but there is no decree against him, and no final settlement of the estate has been made. If, on the final settlement, a judgment or decree shall be rendered against the administrator, for assets which he has duly paid or delivered over to the distributees by their agreement or consent, it will be time enough then for him to complain: until some judgment or decree is rendered against him, he is not injured, and cannot maintain a writ of error.

Let the writ of error be dismissed.

GRAY *vs.* JENKINS.

1. An action at law on their bond does not lie against the sureties of an executor, on a decree against his administrator, rendered by the Orphans' Court on the final settlement of his executorship, under the act of 1845.

Error to the Circuit Court of Lawrence.

Tried before the Hon. Thomas A. Walker.

WILLIAM COOPER, for plaintiff in error.

L. P. & R. W. WALKER, *contra.*

GOLDTHWAITE, J.—The main question presented is, as to the sufficiency of the declaration. The action is in the name of the Judge of the County Court, for the use of William B. Jenkins, who is a legatee under the will of Augustine Jenkins, and the defendant is one of the sureties upon the official bond given by his executor, Jennings. The declaration sets out the death, probate of the will, grant of letters testamentary, and the execution of the bond by the defendant below: it also alleges the death of Jennings, the executor, without settling his accounts as such, the appointment of an administrator upon his estate, the settlement by him of the accounts of his intestate as executor with the Orphans' Court, and a decree against him by such court, in favor of the legatee, to be levied of the goods and chattels of the intestate in the hands of the administrator; it also alleges the non-payment of the decree, and a *devastavit* by the executor in his life-time, to the amount of the same.

Of the various grounds which have been urged in support of the demurrer, we shall consider but one; and that is, whether the sureties of a deceased executor are liable, at law, upon the facts alleged in the declaration.

By the common law, if an executor committed a *devastavit*, and died, his executor or administrator was not liable, upon the ground that it was a personal tort in his testator or intestate, which died with the person; but the rule was otherwise in equity.—Taliaferro v. Bassett, 3 Ala. Rep. 670; Snedicor v. Carnes, 8 Ala. 655. The rule of the common law was changed, with us, by the act of 27th January, 1845 (Acts 1844–5, 166), and 4th February, 1846 (Acts 1845–6, 14), which invested the Orphans' Court with the power to settle the accounts of the deceased executor or administrator as such, with his personal representative, and to render a decree for the balance found due on such settlement in favor of the administrator *de bonis non*, the heirs and distributees. The object of these statutes, was, to afford the Orphans' Court the means of reaching the estate of the first executor or administrator, in the hands of his personal representative; and, perhaps, the remedy would extend to the assets of the first estate unadministered; but it could go

no further. The settlement made by the administrator of Jennings was not binding on the sureties of the latter, for the reason that it was, as to them, *res inter alios acta*. They were neither parties nor privies to it, and it was not a proceeding *in rem*. We have held, it is true, that the sureties of an administrator are concluded by the settlements of their principal in the Orphans' Court (Williamson v. Howell, 4 Ala. 694); but this was on the ground, that the settlement was an act done by the administrator in pursuance of law. Here the act is not done by the principal: the settlement is made by his administrator, and, although it may be conclusive upon the latter and his sureties, it has no effect whatever upon the sureties of the first executor (Lucas v. The Governor, 6 Ala. 826), and as to them no change is made in the remedy.—Jenkins v. Gray, 16 Ala. 100.

As the settlement made by Galloway, and the decree rendered against him, had no effect upon the sureties of Jennings, the declaration, which rested the liability of the appellant, in part, upon these facts, was defective. The demurrer should have been sustained, and as this point is conclusive of the case, it is unneccessary to decide any of the other questions presented.

Judgment reversed, and cause remanded.

BILLINGSLEY'S ADM'R *vs.* BILLINGSLEY.

1. When a note is payable on a specified day, and contains a stipulation that it shall not bear interest until another specified day after maturity, an action may be maintained on its non-payment at maturity, although the judgment will bear interest from the time of its rendition; but the judgment must be for the principal only, without interest.
3. And the fact that the note is secured by a mortgage containing a power of sale, in which the law day is fixed at the time when interest begins to accrue, does not affect the mortgagee's right to proceed to judgment on the note, if it is not paid at maturity.

APPEAL from the Circuit Court of Perry.

Tried before the Hon THOMAS A. WALKER.

THE appellant, as the administrator of Thomas Billingsley, deceased, sued the appellee on two promissory notes, each for the sum of $4,599, dated August 5th, 1848, and payable to said Thomas Billingsley, or bearer, on the first of January, one in 1851, and the other in 1852; each of said notes containing the following stipulation: "But said note is not to draw interest after maturity, until the first day of January, 1854, from which time, if not paid, it is to bear the legal rate of interest." The action was commenced on the 9th of April, 1852.

On the trial, the plaintiff offered in evidence, after proving their execution, the two notes declared on, and then rested his case. The defendant then offered evidence, tending to show that said notes were given (with three others of like tenor and date, payable respectively on the first day of January, 1850, 1853, and 1854), for the purchase money of some lands and personal property sold by said intestate to defendant. He also offered in evidence a mortgage, bearing even date with said notes, and constituting a part of the same transaction. This mortgage conveys said lands to said intestate, to secure the payment of the said notes given for the purchase money, and contains a power of sale if said notes are not all paid on or before the first day of January, 1854. This being all the evidence, the court charged the jury, "that plaintiff could recover the principal only of said notes, but was not entitled to interest upon the same"; to which charge plaintiff excepted.

JOSEPH R. JOHN, for appellant, cited the following cases: Newman v. Kettelle, 13 Pick. 418, and Wright v. Fisher, cited in note on page 419; Washington v. The Planters' Bank, 1 How. (Miss.) R. 230; 1 Bouv. Inst. p. 446 § 1109, 445 §1107.

I. W. GARROTT, *contra*, cited and relied on the following authorities: Story's Con. § § 1024 to 1028; Chitty's Con. 558, and notes; Tate v. Innerarity, 1 S. & P. 35; Branch Bank at Montgomery v. Harrison, 1 Ala. 9; Ijams & Carr v. Rice, 17 *ib.* 404.

CHILTON, C. J.—Under the circumstances presented by

this case, it is impossible to give full effect to the contract of the parties. If no suit can be brought until the time the note is to draw interest, then we must disregard entirely the day particularly specified in the note when it is due and payable; and if an action can be maintained on it, and a judgment recovered before the period fixed for interest to commence, then the judgment must draw interest, and thus the demand will be accumulating before the time agreed on by the parties. It is our duty, however, to give effect to the contract as far as we can, without violating any rule of law; and it is our opinion, that the construction which comes nearest to effectuating the intention, is, that the right of action accrued at the time specified in the instrument as the day of payment, but the note does not draw interest, so long as the demand is evidenced by the note; so that, if no judgment is recovered upon it, no interest accrues until the time agreed on by the parties. But if, in the meantime, a judgment is recovered, then the note becomes merged in the judgment, which now becomes the evidence of the demand, and which bears interest from the time it is rendered.—Ijams & Carr v. Rice, 17 Ala. 404.

If we recur to the mortgage given to secure this note, and treat the note and it as forming one contract, we find nothing changing in any way the legal effect of the note as evinced by the face of it. It is correctly described in the recital of the mortgage, and the law day is fixed at the period when interest begins to accrue upon the note. This does not, in any wise, affect the right of the mortgagee to proceed on the note, when it falls due, to obtain a judgment: it only controls his action as respects the mortgaged property.

The ruling of the court accords with the views we have expressed.

Let the judgment be affirmed.

STEIN *vs.* ASHBY.

1. The City Court of Mobile has jurisdiction of an action on the case to recover damages for the diversion of the water of a running stream to the injury of plaintiff's mill privileges.
2. The use of the water of a running stream for nine years confers no right.
3. Stein v. Burden, p. 130, re-affirmed, as to the principle asserted in the first head-note.
4. The sustaining of a demurrer to a special plea, when the facts stated in it may be given in evidence under the general issue, is not an error for which the judgment will be reversed.
5. In an action on the case for damages to plaintiff's mill privileges, by the diversion of the water, it is not necessary to aver the manner or the means of the diversion.
6. It is sufficient, in such an action, to aver injury to plaintiff's mill privileges, without alleging the existence of a mill. The gist of the action being the invasion of the right, there need be no actual damage, when the act complained of is of such a character that its repetition or continuance might become the foundation of an adverse right.
7. When the course of a running stream through a fractional section prevents the sub-division of the quarter sections into eighty acre tracts, under the act of Congress of April 24, 1820, the sub-division of a quarter section by the United States' surveyor into two tracts divided by the stream, is not in contravention of the act.
8. Certain boundaries are of more importance than quantity in designating lands. Therefore, where a patent calls for a sub-division of a fractional quarter section, described as lying north of a certain creek and containing a specified number of acres, it embraces all the land in the sub-division north of the creek, although the actual number of acres exceeds the number specified in the patent.
9. Stein v. Burden, p. 130, re-affirmed, as to the principles stated in the third, seventh and eighth head-notes.
10. A map, not made under the authority of the State, or of the United States, although "generally received as a correct representation of what purports to be shown or described therein," is not admissible evidence.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

ACTION ON THE CASE by George W. Ashby against Albert Stein, to recover damages for defendant's diversion of the water of Three Mile Creek to the injury of plaintiff's mill privileges. The manner in which, and the means by which

the diversion was effected, are not stated in the declaration, nor is there any averment of the existence of a mill in fact. The defendant first pleaded to the jurisdiction of the court; and a demurrer being sustained to this plea, he then pleaded the general issue and six special pleas, which are as follows:

"2. And for further plea in this behalf, defendant says *actio non;* because, he says, the only piece or parcel of ground, and appurtenances, which plaintiff owns, or to which he has any right of possession, any where in the neighborhood of the Three Mile Creek, is the north-east fractional quarter section of section twelve, township four, in range two west, and that the said fractional quarter section does not lie adjoining to, nor bounded upon, nor touch, the said Three Mile Creek; and that said piece or parcel of land which plaintiff claims, and has a right to the possession of, has, at no time, been injured by any act of defendant, by reason of his abstracting the water from said creek, or otherwise, nor has the value of said plaintiff's lands been, in any wise, lessened, or the possession of the same injured or interrupted, by any act committed or omitted by said defendant; and this he is ready to verify.

"3. And for further plea in this behalf, defendant, by leave of the court, pleads and says, that he and those under whom he claims have had, used, exercised and enjoyed the franchise or privilege of abstracting water from said Three Mile Creek, for more than twenty years next before the commencement of this suit, and from a point on said creek opposite to the lands claimed by said plaintiff, for the benefit of the inhabitants of Mobile, for which purpose alone he has used or abstracted said water; and this he is ready to verify.

"4. And for further plea, defendant says, that he has had and held, used and enjoyed, the right and privilege of abstracting water from said creek, for the benefit of the inhabitants of Mobile, for more than nine years next before this suit was brought, and for the benefit of said inhabitants alone has he, at any time, taken and used said water: and this he is ready to verify.

"5. And for further plea in this behalf, defendant says *actio non;* because, he says, that heretofore, to-wit: on the

20th day of December, 1820, the Legislature of the State of Alabama passed an act, which was duly approved, entitled "an act to incorporate an aqueduct company in the City of Mobile," by which, amongst other things, Lewis Judson and others, corporators, were authorized to abstract and use the waters of said Three Mile Creek, for the use of the citizens and others residing in Mobile; and that afterwards, to-wit: on the 24th of December, 1834, the said corporators having failed to comply with the provisions of said act, the Legislature passed another act, which was duly approved, whereby, among other things, all the rights, privileges and immunities, appertaining to said company by virtue of said first named act, were transferred and vested in the corporation of the City of Mobile, for the use and benefit of the inhabitants thereof; and from that time, and for a long time thereafter, the said mayor and aldermen of Mobile held and enjoyed all the said rights and privileges conferred by the said last named act, to-wit: up to the 26th of December, 1840, when the said mayor, aldermen and common council, by agreement with him made, vested said defendant, among other things, with the right and privilege of abstracting water from said creek, and from a point opposite to the premises claimed by said plaintiff, for the use of the inhabitants of Mobile, for twenty years then next to elapse; which said contract, so made between said corporation and said defendant, was confirmed by an act of the Legislature, approved on the 17th of January, 1841, and said defendant was thereby vested with all the rights, powers, privileges and immunities which said corporation, before that time, possessed, used and enjoyed; and that this defendant, and said corporation under whom he claims, have had, used and enjoyed the privilege or franchise of abstracting water from said creek, from thence hitherto, and before the commencement of this action; and this he is ready to verify.

"6. And for further plea, defendant says *actio non;* because, he says, the only piece or parcel of land of which said plaintiff has any right of possession, or at any time has had, is the north-east quarter of section twelve, township four, range two west, and that the south-east quarter of said section, which lies south of said north-east quarter, is the

property of the corporate authorities of the City of Mobile, to which plaintiff has acquired no possession or right of possession, and from whom defendant has obtained the right to use the waters of said Three Mile Creek; and that said creek runs, and always has run and flowed south of said south-east quarter section, which intervenes between the plaintiff's possessions and said creek; and that defendant abstracts the water from no point on said creek, except at a point in section thirteen south of plaintiff's possessions, and that the abstraction of water from said last named point is no injury to plaintiff's possessions; and this he is ready to verify.

"7. And defendant further pleads, in short, by consent, that whatever trespasses or wrongs he has committed have been upon his own lands, and to his own injury alone, and that he had a right so to do."

There was a demurrer to the second, third, fourth, fifth, and sixth pleas; but the record nowhere shows what disposition was made of it.

On the trial, the plaintiff offered in evidence a patent from the United States to himself, for "sub-division north of Chatauque Creek, of the south-east quarter of section twelve, township four south, in range two west" (for a particular description of this patent see the opinion of the court); also, a plot or diagram, purporting to have been taken from the original survey by the United States' surveyor, of the lands described in the patent. He also proved, that he had been in possession, claiming title, since 1847; and introduced a map of the City of Mobile, made by Charles Delage, who was proved to be dead, and evidence tending to show that it was generally received as a correct representation of what purported to be shown or described therein. The defendant objected to the introduction of the map on this evidence; but his objection was overruled, and he excepted. Evidence was also adduced by the plaintiff, tending to show that said diagram was correct, and that said creek ran as there laid down; also, that there was a mill site on the land belonging to plaintiff.

The defendant then offered a patent from the United States to the City of Mobile, under whom he claimed, for "the south-east sub-division B of fractional section twelve, in township four south, range two west"; also, a map purporting to be a copy

of a survey by the United States' surveyor, showing the location of the land in the patent as corresponding with the diagram before given. He then introduced the agreement between himself and the City of Mobile set out in the fifth special plea, and the several acts of the Legislature referred to in said plea; and offered evidence tending to show that the creek did not run through the south east quarter section, as shown by the diagram introduced by the plaintiff, but ran south of the course therein marked through section thirteen.—The points which were made, as to the course of the creek through said quarter section, and what lands were conveyed by the patents, will be understood by referring to the charges of the court, in connection with the annexed diagram, in which the upper line ABC represents the course of the creek as laid down in the United States' survey, and the lower line AbC represents its course as proved by defendant's witnesses.

The court charged the jury as follows:

"1. That if they believed that the United States intended by its patent to grant to the plaintiff all the lands lying on the north side of the creek in said south-east quarter of section twelve, and that it extended to the whole of the lands lying on the north side of the creek, then plaintiff is entitled to recover all the lands north of the creek down to the section line.

"2. That if they were satisfied from the evidence, that there was no sub-division B, in fact, as laid down on the map introduced by defendant, but that the creek run down into section thirteen, as shown in the diagram, then the City of Mobile had no right, under its patent, to any land in section twelve north of the creek.

"3. That under the act of 1820, incorporating the Mobile Aqueduct Company, and the subsequent acts relating thereto, the water could not be taken from said creek without compensation; and that said acts were no defence to this action.

"4. That no prescription will run, as to rights acquired thereby, against public lands owned by the Government of the United States.

"5. That unless the water was taken by defendant and said City of Mobile, from some point either opposite to Ashby's lands, or above them, no right of prescription can avail against Ashby.

"6. That the rights of the parties to this suit are to be regarded as those between private individuals, and not as involving a public benefit to the citizens of Mobile."

To all of these charges the defendant excepted, and asked the court to give the following charges:

"1. That the statutes of Alabama enabling the defendant to effect a great and beneficial public object, ought to be benignly and liberally construed in his favor, and therefore he is not liable for any consequential damages done under and within the statutes above mentioned.

"2. That to render defendant liable to damages at the suit of the plaintiff, the jury must be satisfied, from the evidence, that he has exceeded the powers conferred on him by the statutes establishing the City Water Works.

"3. That the Legislature of Alabama having granted to the Mobile Aqueduct Company, in 1820, the right to use the waters of Three Mile Creek, to supply the City of Mobile with water, and defendant having succeeded to their rights by subsequent legislation, and Ashby having acquired titles to his lands from the United States, in 1850, after the grants made to the City of Mobile, he is bound by the acts of the Legislature granting exclusive privileges to the City of (Mobile and to said) defendant, and cannot contest said privileges."

Each one of these charges was refused, and the defendant excepted to the refusals; and he now assigns for error all the rulings of the court, above set forth, to which exceptions were taken.

F. S. Blount and C. W. Rapier, for plaintiff in error.

John T. Taylor, *contra*.

GOLDTHWAITE, J.—By the act of the 11th of February, 1848 (Pamphlet Acts 36), the City Court of Mobile was invested with the same jurisdiction as the County Court as to civil actions. By the act of 1807 (Clay's Digest 297 § 5), jurisdiction was given to the County Court, of all actions of a civil nature, excepting real actions, actions of ejectment, and trespass *quare clausum fregit*; and by the act of 1819 it was provided, that the County Court should have concurrent jurisdiction with the Circuit Court in all actions of assumpsit, case, &c. (Clay's Dig. 297 § 7). The

fact that any of the actions may incidentally involve a question of title to real property, is not sufficient to deprive the court of jurisdiction, which was given to the County Courts by both the acts we have referred to. It is true, that we held in the case of Elliot v. Hall, 8 Ala. 508, that the term "trespass," as used in the act of 1819, must be confined to that action as a remedy for injuries to personal property merely; and the reasoning of the judge who delivered the opinion in that case, indicates, that any action which involves an inquiry into titles to real property, was opposed to the spirit of the act. But to extend the doctrine thus far would cut off actions of assumpsit, debt, and covenant, for in all of these, the same question may incidentally arise. The plea to the jurisdiction was properly overruled.

Neither do we think that the court committed any error, which is available here, in sustaining the demurrers to the several pleas as shown by the record. The fourth plea is bad, as the use of water for nine years confers no right.

The fifth plea is also bad, upon the doctrine laid down by this court at the present term, in the case of Stein v. Burden, in which it was held, that the several acts of the Legislature referred to in this plea, conferred no right to the use of the water.

The facts pleaded in the other pleas, could all have been given in evidence under the general issue; and it is the rule in this court, that when that is the case, the sustaining of a demurrer to it is not an error for which this court will reverse.—Shehan v. Hampton, 8 Ala. 943.

It is urged, however, that the declaration is defective, in not showing how the defendant, Stein, diverted the water from the creek; and also, because the injury alleged was to the mill privileges, without averring the existence of a mill. The first objection we do not think can be sustained. There may be cases, in which a statement of the injury in general terms has been held bad (3 Leon. 13); but the correctness of this decision is evidently doubted by Mr. Chitty (2 Chit. Pl. (6 Amer. ed.) 790, n. n); and LeBlanc, J., in The Mersey & Irwell Nav. Co. v. Douglass, 2 East 490, says: "It would have been sufficient to have stated, that they diverted the water above the navigation of the plaintiffs; by means of

which the injury happened." See also Prickman v. Tripp, Skin. 389. In an action on the case for disturbing the right of common, it is not required to state the means.—Com. Dig., Actions on the case for Disturbance, B; 1 Saund. 346, a; 2 Black. Rep. 817; 3 Wils. 378. The strictness of the old rules, in relation to pleading, has been greatly relaxed, and courts at the present day do not lean to objections which cannot affect the substantial justice of the case. We are unable to perceive any good reason, why a distinction should exist between the mode of stating the injury in an action on the case for disturbance, and the same action for diverting water. We think the objection should not be sustained.

Neither is there anything in the other objection. The gist of the action is, the invasion of the right; and whenever the act complained of is shown by the evidence to be of such a character as would admit, by its repetition or continuance, of the foundation of an adverse right, there need be no actual damage.—Parker v. Griswold, 17 Conn. 288; Stein v. Burden, at the present term.

On the trial, plaintiff below claimed under a patent from the U. States, which recited, that whereas George W. Ashby had deposited in the General Land Office of the United States a certificate of the register at the land office at St. Stephens, "whereby it appears that full payment has been made by said Ashby, according to the provisions of the act of Congress of 24th of April, 1820, entitled an 'act making further provisions for the sale of the public lands,' for sub-division north of Chatauque Creek, of the south-east quarter of section twelve, township south, of range two west, containing seventy-two $\frac{20}{100}$ acres according to the official plat of the survey of said lands, returned to the General Land Office by the Surveyor General; which said tract has been purchased by the said George W. Ashby. Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said George W. Ashby, and to his heirs, the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatever

nature, thereunto belonging, unto the said George W. Ashby, his heirs and assigns forever. In testimony," &c.

Evidence was offered showing that the south-east quarter section, referred to in the patent, had been divided into two irregular subdivisions, making Chatauque Creek the dividing line; that the creek did not run through the quarter section, as is laid down in the map of the Surveyor General, but crossed the dividing line between sections twelve and thirteen, as shown by the diagram in the statement of the case.

The charge of the court was, that if the jury believed that the United States intended, by its patent, to grant to the plaintiff all the land lying on the north side of the creek, in the south-east quarter of section twelve, and that it extended to the whole of the lands on such north side, then Ashby was entitled to all the lands north of the creek down to the section line.

Regarding this charge as equivalent, under the circumstances, to instructions that the patent conveyed all the land in the quarter section north of the creek, we proceed to an examination of its correctness in that aspect.

It is insisted by the plaintiff in error, that the division of the quarter section, as made by the Surveyor General, was void, as being in contravention of the acts of Congress in relation to the survey of the public lands; and that the patent, calling for a sub-division thus made, was illegal and void.

The act of Congress referred to in the patent, is that of 24th April, 1820; and its provisions require, that fractional sections, containing upwards of one hundred and sixty acres, should be divided, as nearly as practicable, into half quarter sections, by running the lines north and south (2 Statutes at Large 566), and east and west, according to the instructions of the Secretary of the Treasury,—Public Land Laws, 2 Part 810.

Section twelve was a fractional section, containing more than one hundred and sixty acres; and whether the creek run through the south-east quarter, as is laid down in the plat of the Surveyor General, or as claimed by the plaintiff below, is entirely immaterial, so far as the present inquiry is concerned, as, in either event, that quarter section could

not be sub-divided as required by the act of 1820; nor could the sub-divisions, as made by the Surveyor General, affect the number of half quarter sections which could be carved out of the entire section. In sub-dividing the quarter section, and making the creek the line between the divisions, there was, therefore, nothing in contravention of the act of Congress referred to.

As to what the plaintiff took under his patent, that is equally clear. He had purchased the sub-division north of Chatauque Creek. The reference in the patent, as to the number of acres, was not intended to govern as to the land actually conveyed, but simply to inform the land officers as to the amount of purchase money to be paid by the buyer. The true rule, in relation to the construction of deeds and patents, is, that where a subject-matter is found which may satisfy either part of a repugnant or contradictory description, but not the whole, that part of the description must prevail which is presumed to express, with most certainty, the intention of the parties.—3 Cowen & Hill's Notes to Phil. Ev., 1378, and cases there cited. In designating lands, certain boundaries are of more importance than quantity (Wing v. Burgis, 1 Shep. (13 Maine) 111); and indeed, in the construction of grants, quantity is rarely material except where the boundaries are doubtful.—15 Johns. 472; 5 Mass. 355; 19 Wend. 175. Upon these principles, therefore, the plaintiff was entitled to all the land in the quarter section north of the creek; and if the charge was not substantially correct, it was not more favorable for the defendant in error than the law authorized.

The reasons we have given to sustain the first charge, are equally applicable to the second, and in that there was no error.

The legal questions involved in the other charges given and refused, are settled by the opinion of this court at the present term, in the case of Stein v. Burden; and the fourth and fifth charges assert principles whose correctness are so generally conceded and well settled, that it is deemed unnecessary to discuss them.

The only remaining question presented upon the record, is, as to the action of the court below in admitting the map made by Charles Delage. It does not appear that this map was

made either under the authority of the United States or this State; and the mere fact "that it was generally received as a correct representation of what purported to be shown or described therein," amounts to no more than if his statement, not under oath, as to the same facts, had generally been believed. Upon this evidence, it was improperly admitted; and for this error, the judgment is reversed, and the cause remanded.

POND *vs.* WADSWORTH.

1. When the property of the surety, by his consent, is sold under execution against his principal (the surety not being a party to the judgment), and is bought in by the principal, through an agent, and sent back to the surety's house, the principal, although he afterwards pays the debt under which the property is sold, cannot invoke the doctrine of estoppel to defeat the surety's title.
2. If the transaction was intended by the principal and surety, both being insolvent at the time, to hinder and delay the creditors of the surety, the agent who became the purchaser would hold the property against both parties, and might dispose of it as he pleased; if he did not participate in the fraud, but acted in good faith as agent of the principal, the agreement begin a fraud on the surety's creditors, the principal's title would prevail against the surety, and the fact that the latter afterwards acquired the possession, would not prevent a recovery by the principal, in the absence of all proof that he acquired it under a contract with the principal; the maxim "*in pari delicto potior est conditio possidentis*," does not not apply in such case.
3. The act of the agent, in sending the property back to the surety's house, where the principal also lived, if intended as a delivery to the principal, would vest the title in him by the delivery, and nothing could pass by a subsequent bill of sale to his administrator in trust for his estate; but the acceptance of such a bill of sale by the administrator would not preclude him from deducing title through his intestate under the previous sale consummated by delivery.

ERROR to the Circuit Court of Montgomery.

Tried before the Hon. ROBERT DOUGHERTY.

DETINUE for certain slaves, by the plaintiff in error, as

administrator of Lewis W. Pond, against Margaret Wadsworth, who claimed them as administratrix of Francis L. Wadsworth, deceased. The substance of the testimony adduced on the trial is stated at length in the opinion, and need not be detailed here. The court charged the jury, substantially, as follows:

"If the jury should believe, from the evidence, that Wadsworth was not a defendant in the execution under which the negroes were sold, by the sheriff, but was liable on the original debt only as the surety of said L. W. Pond, and was the owner of said slaves at the time the sheriff received said execution; that Wadsworth, or said Pond by his consent, delivered the slaves to the sheriff to be sold, and the proceeds to be applied to the payment of said execution; that said Pond procured Figh to purchase them, and furnished him with money to do so; that Figh bid them off at the sale, and paid off said execution with money furnished him by said Pond; and that the sheriff, at the request of Pond, made the bill of sale to Figh, then, although this was done to hinder and delay creditors, yet the legal title to the slaves vested in Figh, and was still in him, unless he had parted with it by his bill of sale to the plaintiff, which was in evidence before them. If the jury should believe that the slaves went back to Wadsworth's possession after the sheriff's sale, his possession was in subordination to Figh's title; but if he afterwards, and before the execution of Figh's bill of sale to the plaintiff, while still in possession, claimed them as his own, and asserted title to them, then his possession would be adverse, and Figh's conveyance to the plaintiff would not vest in him such title as would enable him to maintain this action.

The plaintiff excepted to these charges, and asked the court to charge:

1. That, if the jury believed that Wadsworth consented that the sheriff should sell the slaves under said execution, and they were so sold accordingly, and Figh, at the request of Pond, purchased them for him, and sent them back to Wadsworth's house by Pond's order; and that Pond paid the money bid at the sale by Figh, then they must find for the plaintiff, unless they were satisfied that Pond, with or without deed, had re-conveyed the slaves to Wadsworth.

2. That to constitute such adverse possession, as would prevent Figh from making a conveyance to the plaintiff, the

defendant must show that Wadsworth was in possession of the slaves, asserting title to them in good faith, and that Figh knew of such claim before he executed said conveyance to the plaintiff.

3. That, if they believed the sheriff sold sold slaves by the authority or consent of Wadsworth, and by his consent the proceeds of the sale were to be applied to the payment of said execution then in his hands; and that Figh bought them at the sale at Pond's request, and for Pond, and received them from the sheriff, and sent them to the place directed by Pond; and that Pond paid the money, or gave it to Figh who paid it to the sheriff, to be applied to the payment of the execution, then these facts vested the title in Pond, and no deed from the sheriff was necessary, and plaintiff would be entitled to a verdict, unless Pond afterwards sold or conveyed the slaves to some other person.

4. That if Wadsworth was insolvent, and an arrangement was made between him and Pond, with intent to hinder and defraud the former's creditors, and to cover up his property from the payment of his debts, to the effect that the negroes should be sold by the sheriff under the execution against Pond; and if the negroes were so sold by the sheriff, and were bought in by Figh, at Pond's request, and for him; and if Pond paid the purchase money to Figh, and Figh paid it to the sheriff, to be applied to the execution under said arrangement between Pond and Wadsworth; and if a part of said arrangement was, that Pond should buy and hold said slaves for Wadsworth, or for his wife and children; and if Figh received them from the sheriff, and sent them to the place directed by Pond, this was a sale and delivery to Pond, and vested the title in him.

5. That although Wadsworth was asserting title to the slaves at the time Figh made the deed to plaintiff, if his assertion or claim of title was in consequence of an agreement between him and Pond, made to hinder and delay his creditors, that the slaves should be sold under said execution against Pond; and if the arrangement between them, as to who should purchase and hold the legal title, was left to Pond, and Pond got Figh to bid for him, but took the deed in his own name; and if the said arrangement was, that Pond, after all these things had been done, should give the slaves back to Wadsworth, or to his family, then Wadsworth's possession was not adverse, because

not in good faith, and they must find for plaintiff, unless they were satisfied that Wadsworth had acquired another title before the conveyance.

6. That if the negroes were sold by the sheriff, by the authority of Wadsworth to apply the proceeds to said execution then in his hands, and the proceeds were so applied by Figh, who became the purchaser at Pond's request, and a deed was made to Figh by the sheriff, and Wadsworth knew that Figh had become the purchaser at said sale, then, although Wadsworth asserted title against Figh at the time the latter conveyed to the plaintiff, this was not a *bona fide* claim of title, so as to constitute adverse possession, if there was no evidence of any conveyance or the acquisition of a new title by Wadsworth.

The court refused each one of these charges, and the plaintiff excepted to each refusal; and he now assigns for error the charges given and the refusals to charge as requested.

Elmore & Yancey, and N. Harris, for plaintiff in error:

The first charge given by the court was erroneous; because: 1st. It determined that the title vested in Figh, and excluded from the jury all inquiries as to the effect of the evidence of delivery by Figh to Pond.—Nabors v. Camp, 14 Ala. 464; Carlisle v. Hill, 16 *ib.* 398; 21 *ib.* 9. 2. It determined that a delivery would not pass the title from Figh to Pond, although Pond was the purchaser; but we insist, that Figh being the agent of Pond, the delivery to Figh was the delivery to Pond.

2. The second charge given was wrong; because: 1. It excludes from the jury the character of Wadsworth's claim of title—whether *bona fide*, or one of which Figh had notice, or whether Wadsworth had disclaimed holding under Figh. As to the claim in good faith, see Hinton v. Nelms, 13 Ala. 229; Herbert v. Hanrick, 16 *ib.* 598; Abercrombie v. Baldwin, 15 *ib.* 363. As to the disclaimer and notice to Figh, see Harrison v. Pool, 16 Ala. 167; Hinton v. Nelms, 13 *ib.* 229; 18 *ib.* 26. It was proved that Figh had no notice of the claim set up by Wadsworth. There was no evidence of disclaimer by Wadsworth, or acquisition of any new title. 2. It decided that Wadsworth's possession was adverse, when Figh made the release to the plaintiff; and this is a question of fact for the jury.—McMasters v. Bell, 2 Penn. 180; 8 S. & M. 77;

Hinton v. Nelms, 13 Ala. 229; Herbert v. Hanrick, 16 Ala. 594; 21 Ala. 151. 3. It overlooked the fact, that, if Wadsworth held in subordination to Figh's legal title, he held in subordination to Pond's use; and this was such an interest in Pond, that Figh's release to his administrator would vest the legal title in him, although there had been an adverse possession.

3. Both charges, taken together, decide that, although Pond had the use, and there was a delivery to him by Figh, Pond's administrator could not maintain the action on this possession. We insist, that, on the facts, Pond could have resisted a recovery against him by Figh; and we are inclined to think, Wadsworth could have done the same, as the facts show a title in Pond. If it be said, this was a trust for Pond, then the delivery by Figh to Pond was an execution of the trust, and the title was in him.

4. The first and third charges refused could be denied, only on the ground that a delivery was insufficient, but a deed in writing was necessary to pass the title from Figh to Pond.

5. The second and sixth charges refused could be denied, only from overlooking or mistaking the laws as to adverse possession.

6. The fourth and fifth asked could be refused only on two grounds: 1st, that delivery was insufficient to pass the title; 2nd, that the fraud against Wadsworth's creditors, enured at once on the sale to the benefit of Wadsworth, without any act being done by Pond. If it is said, here was a delivery to Wadsworth, and an execution of the fraudulent trust, then the court assumed the delivery to Wadsworth, and assumed a further fact, that it was a delivery for this purpose, as a delivery for any other purpose would not have been in execution of the trust. This, however, was a question of fact, which should have been left to the jury, and the charge did present this question to their consideration.

7. It is said, however, that the only interest acquired by Figh from the sale is that set forth in the bill of sale. We may admit this, as, in fact, we insist Figh never acquired any interest by the sale. He was the agent of Pond. The question is, not what interest was conveyed by the bill of sale, but what interest passed by the sale and delivery. There was no agreement that Pond should buy the negroes; but that they should

be sold, and if a third person had bought, what estate would he have acquired? Pond, by the purchase, acquired precisely the same interest, and the bill of sale made by Newman does not affect that interest. No bill of sale was necessary, the facts passed the title of Wadsworth, and that Newman made a mistake in the bill of sale, either as to the character of the title or interest he was conveying, or the character in which he conveyed, cannot affect the purchaser's rights. Newman purports to convey as sheriff negroes levied on under execution against Pond as his property. The fact is, he sells the negroes as the agent of Wadsworth, and as such agent makes no paper conveyance, but conveys by delivery. The delivery, then, passed all Wadsworth's title. A bill of sale is made afterwards, conveying Pond's title as held before the sale. Does this avoid the title given by delivery, or impair it? But it is said, Newman makes this by Pond's directions. Pond directs Newman to make to Figh the title acquired by the sale, but Newman does not obey these directions, but gives a different conveyance. Pond did not direct Newman to draw up this paper in the form in which it appears, but to make the titles to Figh. It does not appear that Pond ever saw the bill of sale. It may be urged that this direction by Pond, being given after the sale, was authority to Newman to convey the title to Figh that Pond acquired by the sale, and this then passed all Pond's interest. Such an argument needs no answer. The whole transaction resulted in this: the negroes became Pond's by the sale, and he became indebted to Wadsworth for the price they brought, or their value, according to the agreement between them.

Watts, Judge & Jackson, and S. F. Rice, *contra*:

Upon the facts stated in the bill of exceptions, the plaintiff never can recover; and when this is shown, this court will not reverse, even should there be error in the rulings of the court below to which exceptions were taken.

The title to the negroes was in Wadsworth, as is admitted, up to the time of the sale by Newman; but the plaintiff contends, that his testator acquired title by virtue of the proceedings at the time of sale—that Wadsworth's consent to the sale by Newman under the execution in his hands, and the fact that

Newman did sell, divested the title out of Wadsworth, and placed it in Pond or Figh. This position depends for its force on the doctrine of estoppel *in pais*; and to constitute such an estoppel, three things are necessary: first, that the person against whom the estoppel is invoked has done some act, or made some declaration, inconsistent with the truth, with a design to influence; second, that the person alleging the estoppel was ignorant of the truth, was influenced by such act or declaration, and acted on it; and, third, that an injury will result to the party alleging the estoppel, if the other party is allowed to show the truth: fraud and injury must concur to constitute an estoppel *in pais*.—Martin v. Angell, 7 Barb. S. C. R. 407; 32 Maine R. 127; Steele v. Adams, 21 Ala. 534, and plaintiff's brief in that case; Hunley v. Hunley, 15 Ala. 91; Pounds v. Richards, 21 Ala. 424. The facts here show that neither Pond nor Figh ever was in a position to invoke the doctrine of estoppel. They knew all the facts; neither one of them was influenced by any act or declaration of Wadsworth's; neither paid any purchase money; neither will be injured by the assertion of the truth. All estoppels, legal or equitable, are founded upon the great principles of morality and public policy.—Jones v. Sasser, 1 Dev. & Bat. 464. Estoppel will not be extended to accomplish a fraudulent object.—Pennell v. Hinman, 7 Barb. S. C. R. 643; Marshall v. Pierce, 12 N. H. 127.

If the doctrine of estoppel applies at all, it must apply to Pond and Figh. The sheriff's deed to Figh conveys only Pond's interest in the negroes, and not Wadsworth's.—1 Dev. & Bat. 464, *supra*; 8 S. & R. 92. There is no transfer of title by operation of law.—17 Mass. 240; 9 *ib.* 138; *ib.* 242; 14 *ib.* 20; 13 *ib.* 483; 1 *ib.* 86.

The deed from Figh, if available for any purpose, does not aid the plaintiff in this suit. He declares as administrator of Lewis W. Pond, while the deed (if good at all) conveys the title to him individually, and was executed since the death of his intestate.—Glesson v. Herring, 2 Dev. 156. But the deed itself is void, by reason of Wadsworth's adverse possession. The rule holding good faith to be an element of adverse possession, has no application as between confederates in fraud.—Pryor v. Butler, 9 Ala. 418; McDougald v. Scroggins, 8 *ib.* 383.

No title passed out of Wadsworth by what is called the sheriff's sale. That sale was a sham, not seriously entered into, and not intended to be operative (Baker v. Pope, 7 Ala. 161; 1 Dev. & Bat. 574); or it was made to defraud creditors, and the law will not allow its process and officers to be thus used in changing a title from one party to his confederate in fraud.—Boyd v. Barclay, 1 Ala. 34; McGehee v. Lindsay, 6 Ala. 16; U. S. Bank v. Owens, 2 Peters 527; Pennington v. Townsend, 7 Wend. 280; Thompson v. Davies, 13 Johns. 112; Fambro v. Gantt, 12 Ala. 298; 1 Foster's R. 312; 5 Mason's R. 465, 479, 495; 1 Missouri R. 754; Coxe's (N. J.) R. 39; Herd v. Renfro, 14 Ala. 23; Riner v. Stacy, 8 Humph. 288.

The second charge asked excluded from the consideration of the jury all right, on the part of Wadsworth, to dispute Figh's title to the property, except on the ground of adverse possession: it assumes, as a fact, that Wadsworth must have held under Figh, if he held after the sheriff's sale. It excludes from the consideration of the jury the question whether L. W. Pond, or his administrator, had notice of the adverse possession. All the other charges asked are substantially the same, and were properly refused; they are all based on portions of the testimony, and exclude the other facts in evidence from the consideration of the jury.—Nabors v. Camp, 14 Ala.

CHILTON, C. J.—It will better comport with that brevity which it is desirable to maintain in judicial opinions, to lay down the rules of law applicable to this case, by which the numerous charges must be tested, than to proceed with an analysis and examination of each charge separately.

1. The facts are briefly these: Wadsworth, the defendant's intestate, owning the slaves now sued for, consented that Newman, the sheriff of Montgomery County, might sell them, without levy or advertisement, under an execution in his hands in favor of John & Walter Lockwood, for $3,517 69 damages, besides cost, and ten per cent. damages awarded upon the affirmance of the judgment in this court; which execution was against Lewis W. Pond, William A. Campbell, Henry Furniss and J. P. Figh. The proof conduced to show, that Wadsworth was a party to the demand on which the judgment was rendered,

but was the surety of said L. W. Pond. The slaves, owned as above stated by Wadsworth, were, by the consent of himself and Pond, sold by Newman, and Figh, at the request of said Pond, bought them for him (Pond), but paid no money, until some time thereafter. Immediately after they were bid off by Figh, he asked Pond what he should do with said slaves, and Pond told him to send them back to where they came from.—Thereupon, Figh immediately sent them to the residence of Wadsworth, at which place Pond was then boarding, and where he remained for some years, and until about a year before his death, when he boarded elsewhere. The negroes remained in the possession of Wadsworth, and one of them was hired out by the sheriff who sold them, subsequently to the sale; he acting as the agent of Mrs. Wadsworth, to whom he paid the money for the hire.

It appears that, at the time of the sale, both Pond and Wadsworth were insolvent, and executions against them had been returned "no property found" &c. It also appears, that the execution, under which the slaves were sold, was issued on the 8th November, 1847; the bill of sale by the sheriff to Figh is dated on the next day (9th November); and the execution is credited with the receipt of $3,418, besides costs and sheriff's commissions, on the 10th of the same month. Figh, who had purchased or bid off the slaves for Pond, received the money from the latter, and paid it over to the sheriff, and never executed any instrument in writing to Pond; but after his (Pond's) death, Figh executed a bill of sale to the plaintiff in error, who was his administrator with the will annexed, purporting to be for one dollar, and to convey the slaves to him in trust for L. W. Pond's estate. Before this last named bill of sale, which bears date in January, 1851, Wadsworth claimed the slaves, being then in the possession of them, as his own property.

This is the substance of the testimony, which was submitted on both sides.

If it be conceded, that Pond was the principal debtor in the execution, to satisfy which these slaves were sold, and Wadsworth was but his surety upon the original demand, and no party to the execution, it was the duty of Pond to indemnify and protect Wadsworth against his liability; and if the latter consented to allow his slaves to be sold, by an informal sale

under the execution, as the property of Pond, and Figh purchased them at the request of, and for Pond, who sent them back to Wadsworth, from whose possession they came, Pond would not be in a condition to invoke the doctrine of estoppel to defeat Wadsworth's title. He has given nothing for the slaves, has parted with nothing, and suffered no detriment by reason of Wadsworth's consent to their sale as his property. True, he has paid the debt; but this he was bound to do, and the mere ceremony of having the slaves sold, and bidding them off and returning them back to Wadsworth's, could not invest him with title. Estoppels are not favored in law, as they "conclude a party by his own act or acceptance, *to say the truth*" (Co. Litt. 352 a.); and with respect to estoppels *in pais*, they should never be allowed to preclude the investigation and ascertainment of truth, unless the party insisting upon them can do so in good faith, and unless the affirmance of the untruth of the matter set up as an estoppel would work wrong or injustice to the party whose conduct was influenced by it.

It is very clear, that had the facts been ascertained, as the evidence *conduced* to show them, the doctrine of estoppel could not have precluded Wadsworth's administrator from setting up his title. Wadsworth's slaves, by his gratuitous consent, were sold as the property of Pond. We may concede that, had a stranger have purchased, trusting to such consent, and have parted with his money on the faith of it, his title would have been good; otherwise, he might be greatly injured and defrauded. But Pond buys them, through his agent, Figh. He buys, as his bill of sale purports to convey, all the interest which he (Pond) had in them before the sale. What interest did he then have? None; then he bought none. The property remained precisely in the same condition after as before the sale. It would be a strange application of the doctrine of estoppel, to hold that, because a surety consented that his property might, for the purpose of a sale under execution, be treated as the property of the principal debtor, such principal might buy it in, and hold it, as having *purchased his own property, the consideration for it being the payment of his own debt*, which justice and good faith to the surety required he should have paid, thus avoiding a sale, and releasing the surety. The bare statement of the proposition shows, that to allow the principal to set up

such consent as an estoppel, would operate a fraud upon the surety, divesting him of the title to his slaves, which it was the duty of the principal to protect and maintain by the payment of the debt, and vesting that title in the defaulting principal, without the payment of one cent, or the doing of any act which the law, without such sale, did not require. There is no such potency in the mere ceremony of a sale by the sheriff. Nor does the fact that Figh bid off the slaves make any difference. He was the agent of Pond, the mere conduit, as was doubtless supposed, through whom the title could more securely pass.—So far as he, Figh, was concerned, the slaves vested in Pond, when he sent them to Wadsworth's by Pond's direction; this was a delivery to Pond, and they were no longer at the risk of Figh. The bill of sale which he executed, in 1851, to the administrator of Pond, was but an attempt to furnish written evidence of a transaction consummated long before; for, had the slaves died after they were delivered by sending them to Wadsworth's, it is too clear to admit of doubt that the loss would not have fallen on Figh. The title of Pond derives no additional strength by reason of its passing through Figh, who, as we have said, had no interest in the slaves, except as a mere naked trustee for Pond, after the amount which he bid was paid by the latter.

2. Having considered the law of the case, as applicable to the facts hypothetically stated as above, as it is insisted by the counsel that the proof justifies the presentation of it in another aspect, without expressing any opinion upon questions of fact, we proceed to consider the case upon the hypothesis for which they contend.

It is argued, that, Wadsworth being insolvent as well as Pond, the object of both parties in consenting to the sale by Newman and the purchase by Figh, was, to place the slaves out of the reach of Wadsworth's creditors, and thus to defraud them.

If the proof should sustain this hypothesis, then it is clear that Figh could have held the slaves, both as against Wadsworth and Pond. The law holds such transactions, as to creditors and *bona fide* purchasers for a valuable consideration, to be void; but as between the parties themselves, such sales are valid and binding. It follows, if Figh had a good title as

against Wadsworth, he had the right to vest that title in Pond; and his title, as against Wadsworth, was good and available, if his purchase was made under an agreement with Wadsworth and Pond, or with Wadsworth alone, that he should bid them off and hold them, or vest the title by transfer in Pond, to screen the property from liability to Wadsworth's debts.

If, on the other hand, Figh did not in any way participate in the transaction with any fraudulent design, and bought the property in good faith, as the agent for Pond; yet, if it was agreed between Wadsworth and Pond, that the property should pass through the ceremony of a sale under execution as Pond's property, and should be bought in by Pond, either personally, or through his agent, and held by him or his agent, *in order to delay, hinder or defraud the creditors of Wadsworth*, in such case, the title of Pond would avail as against Wadsworth, notwithstanding he was the principal in the debt on which the judgment and execution were founded.

Neither would the fact that Wadsworth afterwards came to the possession of the slaves, in the absence of any proof of a contract or agreement by which he acquired them from Pond, prevent a recovery by the latter: that is to say, the maxim, "*in pari delicto, potior est conditio possidentis*" has no application to such case; for, as between the parties, the law pretermits the fraud, or, if it regards it, does so for the purpose of holding the fraudulent vendor to his sale, thus punishing his fraud by the forfeiture, as it were, of his property so fraudulently disposed of.

3. In regard to the validity of the bill of sale from Figh to the plaintiff in error, it is only necessary to remark, that if Figh bought the slaves as the agent of Pond, and called upon him to know what he should do with them, and was directed to send them to Wadsworth's, where Pond also lived, and this was intended as a delivery to Pond, the title would, under the second aspect of the facts in which we have considered this case, have vested in Pond; and Figh, having parted with his title by this verbal delivery, could have conveyed none to the administrator by his bill of sale in 1851. But, conceding that the title did not pass by the verbal arrangement, and that it was understood between the parties that the transfer should not be consummated until a bill of sale was executed, still the instrument found in

the record does not vest the legal title in the administrator *as such*, although it purports to do so. He takes the property, if at all, as an individual, while he has the equitable right to it as administrator. He is the representative of the deceased, in respect "of the goods and chattels, rights and credits which were of the deceased *at the time of his death*." Such rights as he acquires subsequently to that period, he takes as an individual, but, it may be, as a trustee for the estate which he represents.

It is proper to remark, however, that the fact of accepting a bill of sale by Martin Pond, the administrator, of Figh, does not preclude the administrator from deducing a title through his testator by virtue of a consummated sale by Figh to him.—Estoppels must be mutual; and as the administratrix of Wadsworth is not bound by the bill of sale, so she can take no advantage of it.

The law, as given in charge by the court, does not accord with the views we have above expressed.

The first charge given, excludes from the consideration of the jury the evidence as to whether Figh made a delivery and consummated transfer of the slaves to Pond immediately after his purchase, as some of the proof conduced to show. Upon the hypothesis that the sale was made to delay and defraud creditors, and that Figh bought at Pond's request, and paid for the slaves with Pond's money, the charge left the title in Figh, unless it was divested out of him by the bill of sale to the administrator of Pond. This was erroneous, as restricting the plaintiff's right of recovery to a partial view of the facts, and rendering it unnecessary for the jury to consider other proof tending to show that the title had passed out of Figh, independent of the bill of sale to Martin Pond.

We forbear, however, a further comment on the several charges, as the principles we have stated will be sufficient to guide the primary court in the further progress of the cause.

Let the judgment be reversed, and the cause remanded.

GOLDTHWAITE, J., not sitting.

THE ALABAMA LIFE INSURANCE AND TRUST COMPANY *vs.* PETTWAY.

1. A trustee in a deed, who is also the principal beneficiary, may come into equity, on behalf of himself and the other beneficiaries of the deed, to prevent a sale of the property under executions and attachments at law, to foreclose the deed, and to settle the conflicting liens. Such a bill is properly filed, not only as preventing a multiplicity of suits, and removing a cloud upon the title to the property, but also on the well settled ground that a mortgagee, although he has a power of sale, may foreclose in equity.
2. One of the debts secured by a deed of trust was described as a balance paid by the beneficiary on a certain note on which he was surety for the grantor, while the evidence showed that the debt was paid, in part, with notes of a third person borrowed by the grantor, in payment of which he gave his bond, with the beneficiary as his surety,—that the grantor was insolvent,—that the loan was made on the credit of the beneficiary, and that the latter had paid a portion of the note, and had given his individual security for the balance: *Held*, that it was competent for the parties, as between themselves, to change their relations to each other on the debt, and to treat it as the debt of the surety; and that their relation to each other with respect to the debt did not affect the question of fraud in the execution of the deed.
3. Evidence held sufficient (in this case) to establish the existence and *bona fides* of a certain debt secured by a deed of trust, where the validity of the deed was contested on the ground of fraud.
4. Where a deed of trust is attacked for fraud, a general creditor of the grantor, whose debt is not secured by the deed, is a competent witness to prove the *bona fides* of any secured debt, although he may have another security.
5. Proof of a debt corresponding in every respect, except as to amount, with one of the secured debts, may be received for the purpose of showing a misdescription of the debt, and thus repelling the inference of fraud, although it may not be sufficient to authorize a foreclosure as to the secured debt.
6. If a debtor, in failing circumstances, executes a deed of trust to secure some of his creditors, and, with the intent of saving a portion of the property to himself, fails to disclose the indebtedness of one of the secured creditors to him on another transaction, this would be a fraud upon his creditors, as against any one who, by assenting to the intent, participated in the fraud.
7. If a creditor, knowing the insolvency of his debtor, takes from him a deed of trust to secure the entire amount of his debt, without disclosing the fact that he is indebted to the grantor on another transaction not noticed in the deed, this would be a strong circumstance against him, and would probably be conclusive if the indemnity provided was fully adequate to the secured debts; but, if the mortgaged property was insufficient to pay the secured debts, by an amount exceeding the creditor's indebtedness to the grantor, or if there were other debts or liabilities not provided for by the deed, exceeding the creditor's said indebtedness, this would be sufficient to rebut every inference of fraud or dishonesty.

8. Courts will not strive to force conclusions of fraud; if the circumstances relied on to sustain the allegation of fraud, are fairly susceptible of an honest intent, that construction will be placed upon them.

ERROR to the Chancery Court of Wilcox.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by Mark H. Pettway, for himself and the other secured creditors, to foreclose a deed of trust executed to him as trustee by Charles J. Gee and Sterling H. Gee, and to enjoin certain proceedings at law on the part of other creditors who were not secured. It alleges the execution and existence of the deed, the fact that the property had been levied on, before the law day of the deed, under certain attachments and executions against the grantors, and the danger which would ensue to the trustee's claims from the dispersion of the property; it alleges, further, that a portion of the property conveyed by the deed had been sold under executions which exerted a prior lien to the deed, and that the balance unsold was hardly sufficient to pay the secured debts. The creditors who had levied attachments and executions on the property, are made defendants to the bill; and the prayer is, that the personal property unsold may be disposed of as waste and perishable property, that the proceedings at law may be enjoined, that the conflicting claims upon the property may be settled, that the deed of trust may be established as a lien on the property, and that the whole subject-matter may be administered under the directions of the court.

The answers attack the deed on the ground of fraud, alleging that it was made to hinder, delay and defraud the creditors of the grantors. The answer of the Alabama Life Insurance and Trust Company states, that, in the fall of 1845, said Sterling H. Gee assigned forty negroes to said Pettway, then being in North Carolina; "that said assignment was made to complainant for the purpose of indemnifying him against the payment of any debts for which he was bound as surety for said Sterling;" that said Storling, in 1845, conveyed about $20,000 worth of property to one Perkins, as trustee, to secure complainant against any liability incurred on account of said Sterling; "that complainant is amply indemnified, in North Carolina, against any loss or liability on account of said Sterling and

Charles J. Gee, by the property thus delivered to Perkins and to Pettway; that the property in North Carolina is ample for the security of Pettway; that the Alabama debts were contracted on the faith of the Alabama property."

This general statement of the allegations of the bill and answers is sufficient to show the legal points presented by the case. The Chancellor sustained the validity of the deed of trust, and his decree is now assigned for error.

A. F. Hopkins, for plaintiffs in error:

Equity law requires that every fact essential to the right of the plaintiff to maintain his bill and obtain relief, must be stated in the bill; for no facts are in issue unless charged in the bill, and no proof can be offered of facts not in the bill; nor can relief be granted for matters not charged in the bill, although they may be apparent from other parts of the pleadings and the evidence.—Story's Eq. Pl. § 257; 1 Daniels' Chan. Pl. and Prac. 377, and note 2. The rule is settled, that an admission in a defendant's answer shall be of no avail to the plaintiff, unless the matter of it be put in issue by the bill.—Story's Eq. Pl. § 264; Gresley's Eq. Ev. 22, 23. The consequence of the rule is, that although there is a clear case for relief on the face of the answer, consisting of a defendant's admission, the plaintiff can take no benefit from it, because the bill does not charge the fact which the admission contains; and the plaintiff is frequently obliged to ask leave to amend his bill. The course for the plaintiff to take in such a case, is to obtain leave to amend his bill, by charging in it the case admitted in the answer.—Story's Eq. Pl. § 264; Gresley's Eq. Ev. 22, 23. The Supreme Court of the United States has decided frequently "that no admission in an answer can, under any circumstances, lay a foundation for relief unless it be substantially set-forth."—11 Peters 229, 249. In the case of Harrison *et al.* v. Nixon, the same court decided, that if an answer contained a statement ommitted in the bill, but necessary to the relief sought by the plaintiff, the allegation in the answer could not supply the want of it in the bill, as every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff.—9 Peters 502, 503. The Supreme Court of Alabama has been governed invariably by the same rule. The

court said, in the case of Goodwin v. Lyon, 4 Porter 306, 307, however strong may be the proof of a complainant, and however clear his title to the aid of the court, it is wholly immaterial; if the allegations of his bill are not in harmony with his testimony, it cannot be regarded by the court. In the case of McKinley v. Irvine, 693, 694, the court said: "Nothing is in issue, except such facts as are charged in the bill; and all proof of facts not stated, either generally or circumstantially, must be regarded as without the issue, and consequently irrelevant, and a decree on such facts cannot be supported."—13 Ala. R. 487, 488, 489. The authority of the rule in the English Court of Chancery is established by the references which have already been made to Gresley's Eq. Ev. and 1 Daniels' Pl. and Prac.; and the necessity to amend a bill for the purpose of obtaining relief, by inserting matter in it admitted in the answer, but omitted in the original bill, is shown also by 1 Scho. & Lef. R. 1, 9. An admission in an answer is but evidence, and differs from the testimony of a witness in this only: that it is conclusive, because it acts as an estoppel to the introduction of conflicting evidence.—Gresley's Eq. Ev. 9, 10, and note F.—As an admission is evidence only, it is inadmissible, unless the fact to be proved by the admission be alleged in the bill, and thus put in issue, as allegations must be, to render the evidence competent that is relied upon to prove them. An answer to a bill is required and enforced with a view to furnish an admission of the case made by the bill, either in aid of proof, or to supply the want of it.—Wigram on Discovery, p. 1, § 2.

The bill alleges that the debts charged to be due to the beneficiaries in the deed, are *bona fide*. This allegation is denied by each of the contesting creditors, and each of them alleges in his answer that the deed is fraudulent. The issue thus made involves the character of the deed; and it was competent under it for the creditors, who are defendants to the bill, to prove that Pettway and the Gees provided by the deed for a larger amount than was due from the grantors to Pettway or any other beneficiary. The evidence of Perkins and others, which proves that Pettway was indebted to S. H. Gee in the sum of $15,000, for the negroes he purchased of Gee, that Pettway gave his bond for this sum to S. H. Gee, which was unpaid when Perkins made his deposition, that Pettway concealed the existence of

this bond and the debt of which the bond was the evidence, and treated the indebtedness of the Gees to him as though he owed nothing for the negroes: this evidence was entitled to the effect which the court allowed to it in the opinion that was delivered in this case at the last term of the Supreme Court.

It is understood that the decree heretofore rendered in this case, and which was set aside to allow a re-hearing of the cause, was set aside upon the ground that the answers of the creditors stated that S. H. Gee, in the fall or winter of 1845, assigned about forty negroes to Pettway, other than those conveyed to him by the deed of mortgage, to indemnify him against the payment of any debt for which he was surety for S. H. Gee, and that the indemnity was given to him before the mortgage was made in this State. Such a statement, in all the answers, would be entitled to no effect on the case. If, without such a statement in the answers, Pettway would have no right to relief, the statement, if contained in the answers, would be ineffectual to give him any claim to relief, because the fact contained in the statement is not in issue, as it is not alleged in the bill!—That such a statement in the answers must be disregarded by the court, the authorities which have been already referred to conclusively show. But it would be a mistake to conclude that each creditor's answer contains such a statement. There is no such a statement in either answer of the defendants whose names follow: Bacon and two others, who unite with him in the same answer, A. B. Cooper, E. O. Johnson, B. R. Hogan, Arthur Fant and Joseph Van Devoot, guardian of an infant defendant. Their answers are what the court understood the answers to be when the opinion in the case was formed and delivered. If the deed be fraudulent in part, as to Pettway only, it is wholly void as to him, and he can take no benefit from it against any creditor.—14 Ala. R. 557, 559. An infant is not bound by admissions in his answers.—1 Daniels' Ch. Pl. 214.

A deed securing two notes to the same person, one payable to him as a guardian, and the other as an individual, the former founded on a valuable, and the other without consideration, is wholly fraudulent and void.—14 Ala. 557, 559. A deed fraudulent as to any of the contesting creditors is void, and being void leaves the property as to which it is void in the same condition in which it would be if the deed had not been made, and

therefore liable to all the contesting creditors of the fraudulent grantors.

The bill puts nothing in issue as to the deed of trust made by S. H. Gee to Perkins in North Carolina—states nothing from which the amount of the debts provided for by that deed or the value of the property conveyed by it can be ascertained. The bill alleges nothing in relation to the debt alleged to be due to Wm. R. Clarke by S. H. Gee and Pettway, and therefore puts nothing in issue in relation to that debt. Pettway avoided in his bill all statements relating to the deed made in North Carolina to Perkins, the bond of $15,000 for the negroes, and the note in favor of Wm. R. Clarke, as he avoided also all questions to his witnesses in relation to the same matters. The answers of the creditors deny that the debts provided for in the mortgage to Pettway were due, and allege that the debts paid by Pettway as security of the Gees, were paid with the funds of the Gees or one of them. The testimony offered by the contesting creditors, that S. H. Gee borrowed $15,000 in notes of Wm. R. Clarke, payable to him, and that Pettway paid debts, for which he was surety for Gee, with them, is competent, and proves the fraud of which they were guilty. This evidence proves the truth of the denial in the answers of the *bona fides* of the debts claimed by Pettway and provided for by the mortgage.

The bill does not state the consideration of the note with the name of S. H. Gee as maker, for $2,617 53, payable to Pettway one day after date, and bearing date the 20th of August, 1843; nor does any evidence prove there was a consideration for the note. The only evidence relating to this point is in the depositions of Pritchett, Perkins and Falconer. Each of these witnesses testified he knew nothing of the consideration of the note, but that the signature to the note was in the handwriting of S. H. Gee, and that the signature of said Gee to the settlement referred to by Pritchett, was in Gee's handwriting.—Pritchett is the owner of two notes secured by mortgage to Pettway, due when he made his deposition. He is, therefore, an incompetent witness, and his testimony must be disregarded by the court.—1 Ala. 582; 4 Port. 252. For the right of the parties to have incompetent testimony disregarded by the court, see their agreement, of record. The other two depositions

prove only that the signature to the note is in the hand-writing of S. H. Gee. As no consideration for this note is proved, the attempt to secure the payment of it to Pettway, makes the deed fraudulent and void as to him. Neither the note, the deed, nor the recitals in it, are any evidence against the contesting creditors, that S. H. Gee was indebted in any sum upon the note to Pettway.—4 Ala. 261, 263, 264; 10 *ib.* 137; 5 *ib.* 1, 12; 3 Porter 401, 404, 405; 4 Randolph 282; 14 Ala. 557.

Another note, payable on its face to Pettway as executor of John Powell, one day after date, and bearing date the 16th of November, 1839, with interest from the 28th of May, 1839, for $1,717 14, with the name of S. H. Gee as maker, is provided for in the mortgage as a debt due to Pettway. This note is liable to all the objections made to the note for $2,617 53, and others in addition. The bill does not state what the consideration of the note was, and the testimony does not prove a consideration. The authorities relied upon against the validity of this note are the same that are cited against the note for $2,617 53. It is not alleged in the bill that the note for $1,716 14, described in schedule B, a part of the mortgage, was intended for the note for $1,616 14, the only note produced that is payable to Pettway as executor of Powell, that it was in existence and unpaid at the date of the mortgage, and that by mistake it was described as a note for $1,717 14. No evidence relates to the note described in the mortgage, and none tends to prove that the note for $1,616 14 was intended to be secured by the deed, or that it was then in existence. As there is no allegation in the bill that the latter note was intended to be secured by the provisions in the deed for the payment of a note for $1,717 14, evidence of such an allegation would be incompetent.—10 Wheaton 189. Relief cannot be granted on the note described, because the existence of such a note is not proved, nor even pretended now. Nor can it be granted upon the ground that the note for $1,616 14 was intended by the mortgagors and mortgagee by the description of a note for $1,717 14, as the bill contains no such allegation. Relief cannot be granted on matter not charged in the bill, although the same may appear from the evidence.—13 Ala. 693; 10 Wheaton 189. Without evidence to prove that the note for $1,616 14, was a debt intended to be secured, it is not within the provisions of

the deed, as it is not identified with the mortgage nor other proof.—1 Ala. 710; 12 *ib.* 187.

The legal conclusion from the evidence is, that the Gees and Pettway have provided in the deed for the payment of two notes, the largest of which is not a *bona fide* debt, because there was no consideration for it; and the other for $1,717 14, they do not pretend now exists. As there is no proof that these two notes, or the one for $1,616 14, were *bona fide* debts, the deed is wholly fraudulent as to Pettway, upon the authority of Tatum v. Hunter & Thomas, 14 Ala. 557, and of Moore & Paine v. Tarlton & Paine, 3 Ala. 444. The amount due to Pettway was falsely stated in the deed at a larger amount than the evidence proves was due to him, as it was in each of the two cases last cited.—2 Ala. 314, 18; 1 Story's Com. on Eq. §§ 353, 369.

The next question I shall discuss is, which of the two makers, S. H. Gee or Pettway, was the surety in the note payable to Wm. R. Clarke? The testimony furnishes a clear and indisputable answer to this question. That S. H. Gee was the principal, and Pettway the surety, is ascertained in every mode which can be resorted to, to attain a correct conclusion on the subject. Does the borrower usually make the application by himself or his agent for the loan? If this be a characteristic of the berrower, it is fixed by the evidence in this case upon Gee. He applied to Clarke for the loan, and gave Pettway as his surety. Joint makers of a note, that does not express that either is a surety, are both principals, and, except as between themselves, neither can defend a suit on the note, upon the ground that he is a surety, and that indulgence had been granted without his consent by the holder to the maker, who was the principal, unless he can prove alse that the holder knew, when he gave the indulgence, that the defendant was a surety only. —5 Ala. 455. If indulgence had been granted without Pettway's consent by Clarke to S. H. Gee, Pettway could have successfully defended a suit upon the note, as he could have proved clearly by the terms of the note itself, and otherwise, that he was a surety only. The statement in a note, that one of two joint makers is principal and the other surety, is intended to afford written proof in the contract itself of the relation between the joint makers, and between each of them and the

payee. It is immaterial which of them was at first intended to be the principal; the note as made is conclusive proof of what the final agreement was, as to which maker was principal, and which was surety, and parol evidence is not competent to contradict the written proof of the relationship between the parties. —1 Ala. 164; 10 Ala. 548; 2 Ala. 280; 5 Porter 50; 3 Cond. Eng. Chan. 736, 738. If there be a mistake in the note in this respect, it could be corrected only upon a proper bill in equity for the purpose, putting the mistake in issue.

If the maker, who appears from the terms of the note to be the principal, should attempt to avoid payment, on the ground that he was a surety, and as such had been discharged by indulgence granted without his consent by the holder to the principal, the defence could not be made, because the evidence would not be admissible. The rights of third persons would be affected by such evidence. It would surely be a mistake to conclude that Gee and Pettway acted as if Pettway were the principal. Gee applied for and obtained the loan upon giving Pettway as his surety. It is expressly stated in the note itself that Pettway is the surety. This witness thinks S. H. Gee took the borrowed notes from him, and knows the said Gee was shortly afterwards in the witness' part of the country, collecting the notes the witness lent. Wm. M. Clarke, a son-in-law of Pettway, testified that, in the fall of 1845, Wm. R. Clarke transferred bonds to the amount of about $15,000, either to S. H. Gee or Pettway, that this witness saw these bonds in the possession of Pettway a few days afterwards. That Pettway had some of the borrowed bonds some time after the loan, is consistent with the fact proved by S. Whitaker, that Pettway placed in the hands of Whitaker, for collection, a considerable amount of the borrowed bonds, stating that they were the property of S. H. Gee, and requiring Whitaker to give his receipt for them, as the property of Gee, which Whitaker did. That all the claims mentioned in the receipt were collected, except a small one against Wooten.—Depositions of Whitaker, Wm. H. Edwards, N. W. Long. But if Clarke, the son-in-law of Pettway, intended to state that he saw all the borrowed bonds in the hands of Pettway, his evidence in this respect would contradict the testimony of Wm. R. Clarke, that S. H. Gee was in his part of the coun-

try shortly after the loan, collecting the borrowed bonds or notes. Wm. M. Clarke testified, also, that Pettway obtained from him about $2,000 in notes, for the purpose of paying them to Edmonds, because Pettway said he had not a sufficient amount of the bonds borrowed of Wm. R. Clarke that would suit Edmonds. As Pettway paid to Edmonds the 5th November, 1845, $3,000 in money, his own note for $722, and $3,750 93 in the receipt of Whitaker, for the bonds belonging to S. H. Gee, which he had borrowed of Wm. R. Clarke, it is certain that no notes borrowed by Pettway of his son-in-law, Wm. Clarke, were paid by Pettway to Edmonds. While Wm. Clarke, the son-in-law, does not pretend that he has paid any debt for Pettway as surety for the Gees, and testifies that he had lent $2000 in bonds to Pettway; James H. Walker testifies, that Wm. M. Clarke had paid with Pettway's means between $15,000 to $20,000 of the debts of the Gees for which Pettway was surety!! If the fact be so, how happened it that Wm. M. Clarke did not remember, what it would have been so important to the interests of Pettway to prove, while he recollected that he lent Pettway, his father-in-law, $2,000 in notes, which Pettway told him he wanted to use in payment of the bond to Edmonds. Wm. M. Clarke proved that the bonds or notes were borrowed by S. H. Gee of William R. Clarke. The language of this witness, in speaking of the bonds, is, "for which bonds said Clarke took the note of S. H. Gee as principal, and M. H. Pettway as surety, and that said Clarke told the witness that he considered it M. H. Pettway's debt, as he looked upon S. H. Gee as being broke, and that he said Clarke refused to lend said bonds unless Pettway would become surety."

Immediately after the execution of the note for $15,000 to Wm. R. Clarke, Pettway alone entered into an arrangement with Clarke, the payee, to which S. H. Gee was no party, nor does it appear that he knew of it, that on the interest of the note being paid annually, suit should not be brought for the principal till after five years, provided the surety is deemed solvent. The security referred to was clearly Pettway. This agreement between the payee and Pettway, the surety, was endorsed on the note, and signed by Wm. R. Clarke. Clarke required additional security for the payment of the note, after

Pettway had removed or was about to remove to Alabama, and obtained it.—Deposition of Wm. R. Clarke.

Was there ever a case, in which it was more conclusively proved, which of two joint makers of a note was the surety, than it is proved in this case, that Pettway was the surety in the note, in favor of Clarke? The fact is proved by the application of Gee for the loan of the bonds; by the evidence of Wm. Clarke, that Wm. R. Clarke refused to make the loan, unless Pettway would become S. H. Gee's surety; by the written statement in the note itself, that Pettway was the surety; by the testimony that Gee exercised ownership over the borrowed bond in calling upon the obligors for the purpose of collecting the debts; and the acts of Pettway himself, as agent of Gee, in telling Whitaker, that the bonds he (Pettway) placed in the hands of Whitaker for collection, belonged to S. H. Gee, and taking from Whitaker a receipt for them, as the property of Gee. To all this proof, add the evidence afforded by the endorsement made by the payee on the note for $15,000; that no suit should be brought till after five years, &c.; and the evidence of Clarke, the payee, that to this arrangement he and Pettway were the only parties; thus treating Pettway as the surety, by an agreement with him, to which Gee was no party, for the extension of the time of the payment of the note. Each of the enumerated acts by the three parties respectively, was an act that treated Pettway as the surety.—The assent of Pettway to the extension of the time for payment, was necessary to preserve his liability as surety, but wholly unnecessary if he were the principal. Against the clear conclusion that Pettway was the surety, his only reliance consists of the declarations, as testified to, of the payee, that in the negotiation he regarded Pettway as the solvent debtor; that the bonds were lent on the credit of Pettway; and that the payee refused to lend the bonds unless Pettway would become the surety. These declarations are perfectly consistent with the fact, so conclusively proved, that Pettway was the surety. That Pettway had no indemnity for his liability to Clarke, would not weaken the conclusion that he was the surety. It would be but another illustration of the wisdom of the advice of Solomon against suretyship.

If a creditor of Gee had sued him by attachment, and sum-

moned Pettway as a garnishee before he paid the receipt of Whitaker to Edmonds, on the ground that Pettway had in his hands effects belonging to H. S. Gee; and Pettway had answered that he was the borrower and owner of the bonds mentioned in that receipt, is it possible, upon the testimony in this case, that the issue between the creditor and Pettway could be determined in favor of Pettway? The contesting creditors have proved that Pettway, with the property of Gee, has paid debts of Gee for which Pettway was surety, and attempted to continue them as existing debts due to him, by falsely stating in the deed that he paid them as surety with his own effects. They seek an appropriate remedy for his use of the property of Gee as his own to the prejudice of creditors, and are as well entitled to success as a creditor would be, in the case I have supposed, who resorted to an attachment and garnishment against Pettway as the debtor of Gee. In a case of garnishment, in which an issue should be made between a creditor of Gee and Pettway, upon a denial of the latter that he was indebted to Gee, and on the trial, a witness for the creditor should prove that he held for collection, as the agent of Gee, a note payable to him by Pettway, and produced the note, would parol evidence on the part of Pettway be competent to prove that the note was payable to Gee by mistake, instead of to a third person? and what would be the weight, morally, of such evidence, against testimony in addition to that afforded by the note, that Pettway had said the note was properly made by him payable to Gee, had placed it himself in the hands of the agent, and taken his receipt for it as the property of Gee?

Of the $7,473 89 stated in schedule B of the mortgage to have been paid as the balance due on the note in favor of B. Edmonds by Pettway as surety, he paid the 5th November, 1845, $3,750 93, with bonds which H. S. Gee borrowed of Wm. R. Clarke by the transfer of the receipt for bonds for this amount thus borrowed, which Pettway himself put into the hands of Whitaker, and required of him a receipt for them as the property of S. H. Gee.

The note of Nicholas M. Long, for $3,600, which is provided for by the mortgage as a debt Pettway had paid as a surety, was paid by him in October, 1845, with interest from the 18th July, 1842, in a note Long had made to Wm. R. Clarke. The

latter note exceeded in amount the note which Pettway paid as surety, and the difference Long paid to Pettway.

There is no consideration proved for the note described in schedule C of the mortgage as a note payable to the executors of Sterling Johnson, for about $3,700, or $3,800. The debts to which the attention of the court has been particularly called, as debts for which no consideration has been proved, amount to about $8,800; and the debts due to Edmonds and Long, paid by Pettway with notes belonging to S. H. Gee, that he borrowed of Wm. R. Clarke, amount to about $7,350, exclusive of the amount of interest that was paid on the same notes. The two last mentioned sums, exceeding in amount $16,150, for the greater part of which there is no proof of consideration, and for the balance, abundant evidence to prove that it was paid in bonds or notes that belonged to S. H. Gee, are fraudulently secured by the deed upon a false statement in the deed and bill that the sums of which the $8,800 consist were *bona fide* debts, and that the other sums of $7,350 had been paid by Pettway with his own funds. These falsehoods, intended by the mortgagors and Pettway to deceive creditors, and prevent them from taking steps to collect the debts due to them from the Gees, render the deed fraudulent and void.—2 Scho. & Lef. 501; 3 Munf. R. 521, 533, 534, in addition to the authorities already cited. The pretended settlement between Pettway and S. H. Gee, affords internal evidence that it was fraudulently manufactured by the parties.

Upon the argument of this case at the bar, at the June term, 1852, the counsel for Pettway contended that he was entitled to retain his good fortune in being indebted to S. H. Gee in the sum of $15,000 for the negroes purchased in North Carolina, and thus save himself harmless for his liability as surety to Wm. H. Clarke. But as he became the surety without any contract for indemnity, and the payment of the note in favor of Clarke was extended five years, upon request of Pettway, immediately after it was made, and the bond for $15,000 for the purchase of the negroes, was not made for two or three months after the note in favor of Clarke was executed, Pettway, when he became the surety on the note to Clarke, could not have looked to this indebtedness on the bond for $15,000 for indemnity against his liability as surety to Clarke. Pettway

had paid the part which has been mentioned of the note due to Edmonds, in the receipt of Whitaker, and had paid also the note due Long, in a note made by Long to Wm. R. Clarke, that had been borrowed by S. H. Gee before the bond of $15,000 was made, or the negroes had been sold to Pettway, and had caused the note to Edmonds and the note to Long to be assigned to his son-in-law, William M. Clarke, for the use of Pettway.

But if Pettway had been the principal in the note to Clarke, and the bond for $15,000 from Pettway to S. H. Gee had been left unpaid, that Pettway, might have in his hands funds belonging to Gee to meet his liability incurred for the sole benefit of Gee to William R. Clarke, the false statement in the mortgage, that the debts to Edmonds and to Long had been paid by Pettway with his own means, and still existed against Gee as debts in favor of Pettway, the surety, who had discharged them, would render the deed fraudulent and void as to all the debts stated in the deed to be due to Pettway. With the sum of $15,000 of Gees' money in the hands of Pettway due for the negroes, and the note in favor of Clarke not payable for nearly five years, the bond and note both made before the mortgage to Pettway, the statement in the mortgage deed would be most false, that Pettway paid the two notes with bonds he had borrowed of Wm. R. Clarke, or with his own funds derived from any other source. The pretext could be resorted to only for the purpose of deceiving the creditors of Gee, by fraudulently concealing the fact, that for the borrowed notes he used in paying the two notes, he received payment by taking a credit to an equal amount upon his bond for $15,000, the purchase money of the negroes, and making the false impression, that Gee owed him the amount of the two debts he, Pettway, had paid as surety, which were therefore justly secured by the deed of mortgage. If, therefore, Pettway was entitled by an agreement with Gee, made when he purchased the negroes, to hold the $15,000, the price of them, as an indemnity for his liability on his note to Clarke, he and the mortgagors have been guilty of a fraud, in treating the debts that were once due to Edmonds and Long as existing debts in favor of Pettway. If there were such an agreement, he would be entitled upon it, as against Gee, to a credit on the bond for $15,000 to an amount

equal to the aggregate of the two sums he paid to Edmonds and Long; and therefore the concealment of the indebtedness on the bond for $15,000, and the false statement in the mortgage and bill that these two debts still exist, but are due to Pettway, because he had paid them as surety, and with his own funds, would make the deed fraudulent and void as to him. In either of these aspects of the case, the deed is fraudulent; but, in the true aspect of it, is still more grossly and injuriously fraudulent. The bond for $15,000 existed at the date of the mortgage deed of 22d November, 1845, as well as a note for $140, due from Pettway to S. H. Gee.

The aggregate of these two sums should have been deducted, if the indebtedness of the Gees to Pettway exceeded the aggregate amount from their indebtedness to him, and the balance only secured to him by the deed. The concealment of the sum he owed, upon the bond for $15,000 and his own note for $140, proves that he and the mortgagors intended to deceive the creditors of Gees, by making upon them the false impression that the Gees were indebted to him in a sum exceeding $15,000 more than would have appeared in his favor, if the existence of these two debts due from himself had been disclosed and made known to the creditors. Upon the same principle, the notes borrowed by Gee from Clarke and used by Pettway, in paying as a surety the two notes that have been mentioned, should have been treated as paid by Gee himself, because they were paid with his property; but treated as they were, as if they had been paid by Pettway, as a surety, and with his own funds, the deed secured to Pettway, as a consequence of this additional fraud, the aggregate amounts of what he paid in the borrowed notes to Edmonds and Long.

According to Pettway's own statement to Perkins, he was under no obligation to Gee or any of the creditors to pay the $15,000, the price of the negroes, or any part of the sum to any creditor of Gee. The meaning of what he said to the witness, was, that he had the right to do with the $15,000 what he pleased. His exemption from obligation to pay the price of the thirty-six negroes, made the deed fraudulent and void as to him.—2 Johns. Ch. R. 35, 44.

JOHN A. CAMPBELL, *contra*:

The bill was filed by the trustee in the deed, in behalf of

himself and the other secured creditors, to maintain its hold upon the property conveyed, against other creditors who claimed adversely to the deed, and were attempting to subject the property under executions and attachments at law. Its object was, to prevent the multiplicity of suits, to prevent the sacrifice of the property at sales under conflicting and contested titles, to ascertain the priority of liens among the creditors, to foreclose the mortgage, and to administer a trust fund under the directions of the Chancery Court. The bill was well filed on several distinct grounds.—9 Ala. 705; 1 Hill's Ch. R. 41; 3 Monroe 570; 2 Johns. Ch. 525; 6 Monroe 194; 6 Leigh 587; 12 Ala. 410.

The defendants who answered the bill, are composed of two classes: those who claim liens prior to the deed, and therefore paramount; and those who contest the deed as false and therefore void. The sums collected out of the trust fund, on account of prior liens arising from judgments or attachments, amount to $24,175 77. The defendants who impeach the deed, allege that it was made to hinder and delay the creditors of the Gees; that it was executed with circumstances of great secrecy; that its existence was concealed until after the adjournment of the Circuit Court of Wilcox; that none of the preferred creditors but Pettway knew of its existence; and that it was not designed to be operative, if certain suits, then pending against the Gees in the Circuit Court, could have been continued. The issues presented by the pleadings, on examination, are but two, viz., the *bona fides* of the debts from the Gees to Pettway, and the sufficiency of his security for his liabilities.

The prior liens on the property, and the debts which are preferred to Pettway's amount to $40,075 77 The debts which Pettway holds against the Gees ($29,907), and his liabilities for them as surety (16,300), amount to $46,207. The sales by the sheriff and register amount to $69,339 00. It will be seen, therefore, that Pettway was not fully secured, but, on the contrary, that only about sixty per cent. could be realized from the sales; Pettway will be a creditor for more than $15,000, when all the provisions of the deed of trust have been fulfilled.

Besides the debts secured by the Alabama deed, Pettway

was liable for the Gees, in November, 1845, on other debts amounting to $22,520 ; and his only security for these debts was the slaves which had been transferred to him, and which the answer treats as an assignment to him for security. After the filing of this bill, and during Pettway's absence in Alabama, Sterling Gee made a deed of trust to Perkins, providing for these last debts, together with others, the whole amounting to about $30,000 ; but this property, according to the testimony of Perkins, did not provide for more than $15,000 of the debts described in the deed. It is obvious, the execution of this deed cannot enter into the consideration of the question of the fairness of the Alabama deed ; for the reason, that it was executed nearly six months after the Alabam deed, and after all the litigation under the Alabama deed had commenced. The facts show, that Pettway was under liabilities, at the date of the Alabama deed, to the amount of more than $25,000, which were unprovided for by that deed, and for which he had security to the amount of $15,000 only, by the transfer to him of the thirty-six negroes, by bill of sale in November, 1845. The Perkins deed was designed to furnish a security for these North Carolina debts, which were but imperfectly secured, or not secured at all.

The assignment of the thirty-six negroes, for which Pettway had a bill of sale, is brought before the court by the answers. The only equity claimed from the transaction is, that, whereas the debts in Alabama were contracted by the Gees on the faith of the property here, and Pettway had an adequate indemnity in his hands in North Carolina, he should be turned over to that, rather than to the property embraced in the Alabama deed. There is no charge that this assignment was made upon a secret trust in favor of the Gees; there is no charge that it was clandestine, or designed to defraud ; there is no charge that it was unduly withheld from the knowledge of the other creditors of the Gees ; there is no charge that there were not existing liabilites for which such an assignment might be made. Pettway could not properly have introduced this transaction into the bill : he was not the sole beneficiary of the deed, nor the sole plaintiff in the case; the introduction of a general accounting

with the Gees, and a general settlement of the North Carolina trusts and debts, with protection to the Alabama trust estate, would have subjected the bill to the charge of multifariousness. The defendants were entitled to bring the facts to light, and they did so; not as evidence of fraud, but with a view of exonerating the Alabama property, and turning Pettway on the North Carolina property for satisfaction. This aspect of the case was met by the proof of the North Carolina liabilities on the part of Pettway, not comprised in the Alabama deed, sufficient to absorb that property. The Alabama deed did not secure Pettway, as above shown, within $15,000 and upwards of the debts and liabilities which are acknowledged and proved. The introduction of this debt in reference to the slaves in the deed, would not have altered the situation of any creditor under that deed to the amount of one dollar.

GOLDTHWAITE, J.—The circumstances under which the bill in the present case originated, were as follows:

Sterling H. Gee, who resided in Halifax County, North Carolina, and Charles J. Gee, who lived in Wilcox County, Alabama, were partners in buying and selling slaves, and also in planting. They did not use a firm name, but the business was usually conducted in the individual name of the partner who transacted the business. They became embarrassed in the fall of 1845, and on the 22d November of that year made a deed of trust, of specific property in Alabama, for the purpose of securing certain debts enumerated therein. The complainant, Pettway, was the largest beneficiary and the trustee in this deed, although there were other creditors preferred to him; and the right of the trustee to sell the property was dependent upon a default to happen in January, 1846.

Before the default, the property was levied on by creditors, some of whom had liens paramount to those of the trustee, and some of a subsequent date. Pettway then filed his bill, as trustee, on behalf of himself and the other beneficiaries in the deed, to protect the property from pursuit; setting out the deed of trust, the danger to which the property was exposed from a sale under levies from attaching and execution creditors; and praying an injunction (which was granted), and also a

foreclosure under the direction of the court. A supplemental bill was filed, the object of which was to bring in other creditors, to suspend legal proceedings against the property, and to settle the liens.

The creditors who had levied upon the property, contest the deed as fraudulent; and this is the only substantial ground of defence; for, if the deed is valid, it is clear that the bill is well filed, not only on the ground of preventing a multiplicity of suits, and removing a cloud upon the title of the property, but also upon the well settled ground that a mortgagee, although he has the power to sell, may yet come into a court of chancery to foreclose. The mere power to sell cannot deprive equity of its jurisdiction, especially when the power is embarrassed by other claimants to the property or its proceeds.

Regarding the question of fraud in the execution of the deed, as the only one presented upon the record, we proceed to the consideration of that question.

One of the debts enumerated in the deed, and which it was intended to secure, is described as the balance due on a note payable to Benjamin Edmonds, made by the Gees as principal, and Pettway as surety, which had been paid by the latter; and it is insisted, that the evidence shows that this amount, instead of being paid by Pettway, was in fact paid with the funds and effects of the Gees. The testimony proves that the amount was paid, in part, by notes which were borrowed of William R. Clarke by Sterling H. Gee, and that in payment of the notes he gave a bond signed by himself as principal and Pettway as surety. As between the parties to the transaction, it assumed the shape of a loan to Gee, upon the security of Pettway; but it was competent for Gee and Pettway to change their relation to each other. The recital in the note does not affect them (Pollard v. Stanton, 5 Ala. 451); and upon the issue of fraud we must look to the intent of the parties. Here, in addition to the facts we have stated, the evidence shows that the loan was made on the credit of Pettway,—that Gee is insolvent,—that Pettway has paid a portion of the note given to Clarke, and has given individual security for the balance. The note to Clarke is treated, both by the Gees and Pettway, as the debt of the latter, by including it in the mortgage as his; and whether it be considered as an actual debt of Pettway, or a

liability which he was under for the Gees, can, when viewed in relation to the question of fraud, make no difference; it being obvious, that it was the intention of the parties to provide for it in either shape. We think, however, that the evidence shows a change of position, as between Gee and Pettway, as to this note, and so far as they are concerned, it may properly be regarded as the debt of the latter.

It is also insisted, on the part of the plaintiffs in error, that a note, included in the mortgage as a debt to Pettway by note of S. H. Gee, for $2617 53, is not proved. This note is dated in August, 1843; and the signature is proved by the witness Pritchett to be that of S. H. Gee. The same witness, also, proves that seven negroes, a horse, mule, and two carts, the property of Pettway, were delivered by him to Gee before that time in the same year, which were carried by the witness, by the directions of Gee, to Alabama, and there delivered to him. He also proves the hire of a negro by Pettway to Gee the same year; and these circumstances, taken in connection with the peculiar relations which the parties are shown to have occupied towards each other, we regard sufficient. It is urged, however, that the witness who proves these facts is incompetent from interest, and that under the agreement which it appears from the record was entered into by the counsel, to the effect that illegal evidence should not be considered by the court, this evidence should be wholly disregarded. We agree, that if the witness is interested, his evidence goes for nothing; but we are unable te perceive that he has any interest in the event of this suit. He states, that he holds two notes upon the Gees, on which there is due about $260; but these notes are not embraced in the mortgage, which it is the object of this suit to foreclose; and although they are in the deed of trust to Perkins, made in April, 1846, this cannot affect his competency, as no debt is secured by that mortgage which is contained in the Alabama deed, to which he occupies the position of a general creditor; and, if interested at all, it is in defeating it.

Objections are also urged, upon the same ground, to two other claims enumerated in the deed; the one referred to as a note to Pettway, as executor of John Powell, for $1717 14, and the other as a note to the executors of Sterling Johnson. The first note is not proved; but a note answering the descrip-

tion in every respect except that it is for $1616 14, is fully established by the evidence; and although it may be that the allegations of the bill are not sufficient to a decree of foreclosure upon the note proved (a point which the deficiency of the mortgaged property to meet the other demands of Pettway, renders it unnecessary to decide), we are satisfied that the evidence was proper, as tending to repel the imputation of fraud which might otherwise arise. The question upon that issue would be, simply, whether the note described in the mortgage was simulated; and if the evidence shows that it was merely misdescribed, it repels every prejudicial inference which might arise if such proof was not made.

The debt due the executors of Sterling Johnson, is fully proved by the witnesses R. B. Price and Wade Johnson. The mortgage, it is true, does not specify the amount of this note with particularity, but the debt to which it refers is clearly established.

The only remaining objection to the validity of the deed, is, the conduct of Pettway in connection with the purchase of the slaves from S. H. Gee. These slaves were thirty-six in number; the purchase was made in North Carolina; the price was $15,000, for the payment of which Pettway gave his bond, which was in the possession of Gee at the date of the mortgage, and during the progress of the suit. The indebtedness of Pettway to Gee is not referred to in the deed of trust, nor does it appear from the bill or the other pleadings in the cause; and the transaction, taken in connection with these facts, is strongly pressed by the plaintiffs in error, to show that the deed was fraudulent as to Pettway. The answers of the Alabama Life Insurance Company, as well as the answers of several others of the defendants below, refer to this transaction, and, without impeaching its integrity, insist upon it as an assignment made by Sterling H. Gee for the benefit of Pettway, with the object of driving him to seek relief from that fund, instead of the indemnity provided by the deed in Alabama. We do not, however, give to this statement the same effect that the counsel for the defendant in error seems to attach to it. It may be, that if Pettway had obtained adequate indemnity in North Carolina, the creditors of the Gees in Alabama might, under some circumstances, have forced him to look to that security, rather than to the fund

provided here; and it was doubtless the object of the defendants to do so, if the transaction referred to should assume that shape. But it must also be remembered, that every answer, by an express allegation, assails the deed for fraud; and if the transaction standing alone, or in connection with other circumstances, sustains this allegation, we are not prepared to say that it could not be used for that purpose. Be this, however, as it may, there are other defendants, claiming adversely to the deed, whose answers impugn its integrity, without referring to this transaction at all; so that, upon these answers, we are forced to a consideration of its influence, either by itself, or in connection with the subsequent conduct of Pettway, precisely the same as we would be obliged to consider any other facts established by the evidence in the case.

We do not understand that it is the object of any of the defendants to impeach this sale. So far as the parties to it were concerned, there is nothing in the evidence to show that it was not perfectly fair and in good faith; the purchase having been made by Pettway with the view of securing himself, either in whole or in part, against the liabilities he was under for the Gees. The argument, on the part of the plaintiffs in error, is, that instead of the mortgage made on the 22d November, 1845, showing the actual amount of the indebtedness of the Gees to Pettway, it in fact showed $15,000 more than was really due, and that this fact, coupled with the failure of the latter to disclose this amount of indebtedness on his part, must be regarded as fraudulent. Upon the law applicable to the question, we entertain no doubt that if the Gees were in a failing condition, and if the object of the conveyance was connected, on the part of the makers, with the intent of saving to themselves any portion of the property embraced by it, it would be fraudulent against creditors, as to any party who, by assenting to the intent, participated in the fraud.—Lee v. White, 7 J. J. Marsh. 525; Bird v. Aikin, Rice's Eq. R. 73; Maples v. Maples, *ib*. 300; Byrd v. Bradley, 2 B. Mon. 239. So, if a creditor should falsely insert in his mortgage a debt larger than was really due, that circumstance, we apprehend, would be conclusive as to a fraudulent intent; because no other motive could reasonably be ascribed to an act of that character. We concede, also, that if Pettway, knowing the insolvency of the

Gees, and being indebted to them in the sum of $15,000, was to take a mortgage securing all the debts due and liabilities he was under for them, without disclosing in the deed the fact of his indebtedness, it would be a strong circumstance against him; and if the indemnity provided was fully adequate to the debts enumerated in the mortgage, it would probably be conclusive. If, however, it should clearly appear, that the mortgaged property was inadequate to secure the debts provided for, to an extent exceeding the amount of the indebtedness of Pettway; or if there were other debts or liabilities, not embraced in the mortgage, and exceeding his indebtedness to them, it would then be sufficient, in our opinion, to rebut every inference of fraud or dishonesty. The reasonable presumption, then, would be, that the debt was withheld to provide for his own security, which he had a perfect right to do, although its effect might be to defeat other creditors. What is the meaning of a fraudulent intent in respect to creditors? It means that the design of the parties was to prevent the property of the debtor from being applied, either in whole or in part, to the payment of his debts (Nicholson v. Leavitt, 4 Sand. Sup. Ct. R. 252); and if that was not the object of the parties, the conveyance is not fraudulent. Suppose the Gees were indebted to Pettway, by other debts than those specified in the mortgage, to a greater amount than the purchase money of the slaves referred to; and that his design in holding back the debt, was to set it off against the debts he held against them. Would that be fraudulent? No authority has been cited, and none can be found, which carries the doctrine thus far. Courts will not strain to force conclusions of fraud; and if the circumstances relied on to sustain that allegation, are fairly susceptible of an honest intent, that construction should be placed upon them.

In relation to the question we are now considering, we have made a careful examination of the record, and find these results:

The debts and liabilities which the mortgage was made to secure, and which are proved by the evidence, were about		$44,400 00
The sales of the mortgage property, made by the sheriff and register, amount to	$69,000 00	

The debts preferred by the mortgage to Pettway's, and the liens paramount to the mortgage, and not embraced in it, amount to about	$39,900 00	
Balance of proceeds of sale, to be applied to the payment of the secured debts,	$29,100 00	$29,100 00
Amount not secured by mortgage,		$15,300 00
In addition to this, the evidence establishes that Pettway was liable for other debts of the Gees, not included in the Alabama deed, amounting to upwards of		$17,000

It appears, therefore, clearly, that the security provided for the mortgage executed 22d November, 1845, was insufficient to meet the debts owing to Pettway by the Gees, and the liabilities he was under for them, by upwards of $30,000. Under these circumstances, we cannot say that the keeping back the debt owing by Pettway, for the slaves purchased by him, was evidence of an intent on his part to defraud the creditors of the Gees, but must ascribe it to the more natural motive of securing himself against liabilities which far exceeded that amount. The vice of the former opinion was, in considering the security afforded by the deed of trust in Alabama as affording full indemnity to Pettway, which was a mistake of fact.

If the failure to refer to the debt of $15,000, in the mortgage, cannot be regarded as a fraudulent act, we do not see how the failure to disclose it in the pleadings can be so considered. The object of the suit was, the protection of the trust property, —to settle the rights of creditors claiming under the deed, and those claiming under judgments, executions, and attachments, and to execute the trusts as they were disclosed. To do this, it was entirely unnecessary to set out any other transactions than as to the debts specified in the mortgage; and if it would have been superfluous to allege it in the bill, the failure to do so affords no evidence whatever of a fraudulent intent. We say nothing in relation to the North Carolina deed of trust; for the

reason, that it was not executed until some months after the Alabama deed, and the evidence shows that the property included in it, if it had been appropriated to no other debts than the liabilities which it is proved Pettway was under for the Gees, would still, taking into estimation the inadequacy of the other mortgage, have failed to secure Pettway by a sum considerably greater than his debt.

Our conclusion is, upon the whole evidence, that it proves no fraud, so far as Pettway is concerned.

The decree of the Chancellor is affirmed.

MONTGOMERY *vs.* GIVHAN ET AL.

1. Where an executor, by an arrangement with the creditors of the estate, obtained indulgence on the debts, which enabled him to purchase some of the property, at a sale under an order of the Chancery Court, which was had by consent, he was held to have purchased for the benefit of the estate, and not for himself individually; there being, also, some evidence of his declarations or admissions, at the time of the sale, that he was purchasing for the estate.
2. Where a bill is filed against an executor to compel a settlement and account of his trust, and to have complainant's portion of the estate (she being a married woman, and her husband insolvent) settled to her separate use, if the bill alleges that certain slaves in the defendant's possession were purchased with the funds of the estate, while the proof shows that they were purchased with his own individual funds, but under such circumstances that a court of equity would consider them assets of the estate, there is no fatal variance between the allegations and proof.
3. When an admission of record is made by counsel in the court below, for the purpose of obviating the necessity of proof, it will be presumed that he had authority to make it, and the admission cannot be withdrawn in the appellate court.
4. Where the executor was also complainant's guardian, he should be allowed a credit, on the settlement of his accounts in equity, for reasonable expenses in boarding, clothing and educating her, although such expenses may exceed the interest or annual profits of her estate in his hands, if they were necessary under the circumstances; and if she, while residing with him, performed valuable services for him, she is entitled to set-off their value against his demand for board, &c.
5. If the ward and her husband continue to board with her guardian, after

their marriage, it will be presumed, in the absence of proof of any contract or agreement between the parties, that it was understood between them that the price of their board should be charged to the wife's property in the hands of her guardian; and the guardian will be allowed a credit for the amount, on the subsequent settlement of his accounts in equity, although the husband is insolvent.

6. The executor would also, in such case, be entitled to a credit for the value of slaves delivered to complainant and her husband when they commenced house-keeping, when complainant does not offer, in her bill, to return them, and her husband assents to her right to have them settled upon her for her separate support and maintenance.

7. The wife's right to a settlement of her property to her separate support and maintenance, is unaffected, as between the executor and herself, by any transactions between him and her husband, which had no reference to her estate in the executor's hands, and were not designed to be credited to that fund.

8. If the wife's property in the executor's hands, in such case, is more than sufficient for the reasonable support and maintenance of herself and children, and her husband is indebted to the executor on the settlement of their accounts, the executor should be allowed to retain the balance due him from the husband after making a reasonable settlement on the wife.

9. If the executor, in accounting on settlement with one distributee or legatee, has accounted for less than he might have been charged with, this does not give another legatee any right to a greater interest in the residue.

ERROR to the Chancery Court of Lowndes.

Heard before the Hon. ANDERSON CRENSHAW.

THIS bill was filed, in 1843, by Jane Montgomery, suing by her next friend, against her husband, Robert B. Montgomery, and the executor, legatees and distributees of her father, Job P. Givhan; its object was to compel a settlement and account from the executor, a distribution of the estate, and a settlement of complainant's portion upon her for her separate support and maintenance, her husband being insolvent. The record is very voluminous, but it is unnecessary to give a detailed statement of the allegations of the bill and answers, and the substance of the testimony. The principal questions raised by the pleadings were: first, for what portion of the estate was the executor accountable; and, secondly, to what credits was he entitled.

It appears that the testator died in South Carolina, in 1824, possessed of the undivided half of a tract of land in that State, a section of land in Alabama on which the town of Hayneville is situated, and about forty negroes; that he

bequeathed and devised all his property, both real and personal, to his widow and eight children, and appointed Richard Appleby and George Givhan his executors; that Appleby first qualified as executor in South Carolina, said George Givhan being then a minor, and Givhan afterwards qualified there, on attaining his majority, and also took out letters testamentary in Lowndes County, Alabama; that the testator, during his life-time, had conveyed said slaves, by voluntary deed, to his wife and children; but after his death this deed was set aside, by the Court of Equity in South Carolina, as fraudulent and void against existing creditors, and the slaves were decreed to be sold to satisfy certain judgments recovered against the executor, in suits which were commenced against the testator while living. The complainant charges, that the executor, George Givhan, purchased eleven of these slaves at the sale, for the use and benefit of the estate; and that with the profits of their labor, and nine other slaves belonging to the estate which he had previously brought to Alabama, he purchased several other slaves, which are now in his possession; that he also purchased the Hayneville tract of land for $5000, for which he has never accounted; and that he has received the rents and profits of the ferry and tract of land in South Carolina; and complainant seeks to make him account for all these items.

The executor admits that he brought nine of the slaves to Alabama, but insists that the profits of their labor were insufficient to support the children of the testator; also admits that he purchased eleven of the slaves at the sale in South Carolina, but insists that the purchase was made for his own, individual benefit, and not on account of the estate; states that the Hayneville tract of land was sold under an order of court, and he became the purchaser at the price of $5000, and bought for himself individually; that the ferry place in South Carolina was sold by the sheriff under execution, and purchased by one Campbell, and that he afterwards purchased it from said Campbell, but for himself individually, and not for the benefit of the estate. He admits his liability to account, on settlement, for the nine slaves brought by him to Alabama, and for the price of the Hayneville tract of land, but for these only; and he insists that he

is entitled to a credit for advances made to complainant and her husband, for the expenses of complainant's board, clothing and education, incurred by him as her guardian, and for the amount of her husband's indebtedness to him, which he insists upon as a set-off; and all these credits being deducted from complainant's portion of the estate, he insists that she has received more than her share.

The Chancellor held, that the purchase of the eleven slaves by the executor in South Carolina was intended by him for his individual benefit, and did not enure to the benefit of the estate; that the executor was only accountable for the nine negroes brought by him to Alabama, with their increase and the profits of their labor, and the price of the Hayneville tract of land ($5000), with interest thereon; that he should be allowed a credit for boarding, clothing and educating complainant, and for other incidental expenses incurred by him on her account, unless intended as a gratuity, making a deduction for the value of her services, if they were worth anything to the executor, who was also her guardian; that he should be allowed, also, a reasonable charge for boarding complainant and her husband after their marriage; that the negroes which he delivered to complainant and her husband when they commenced house-keeping, and which they received and accepted, must be considered a satisfaction, *pro tanto*, of complainant's distributive share of the estate, according to their value when so received; that all moneys paid by the executor to R. B. Montgomery, or to other persons for him, or on his account, after his marriage with complainant, and before he became insolvent, and all his indebtedness to the executor which accrued within that period, must be considered as advances made on the faith and credit of complainant's portion of the estate in the hands of the executor. A reference of the matters of account was ordered, on the principles laid down in this decree, if complainant wished to have the account taken; otherwise, it was ordered that her bill be dismissed at the cost of her next friend. This decree is now assigned for error.

John A. Elmore, for plaintiff in error:

1. The deed mentioned in the pleadings cannot affect com-

plainant's rights or remedy. Givhan does not set it up in any form, nor claim anything under it; but he and all the legatees have uniformly, since the decree in South Carolina, treated it as a nullity. Complainant bases her claim on the will, and not on the deed, and charges Givhan with liability as executor.—He admits his liability, as executor, for part of the property; and if liable for this in that character, he must be liable throughout as executor. He was executor; he always acted as executor; his acts as executor were acquiesced in; he is bound thereby, and must answer as such.—Van Eppes v. Van Deusen, 4 Paige 64, 71; Brown v. Lynch, 1 *ib.* 147; White v. Swain, 3 Pick. 365; Andrews & Bro. v. Jones, 10 Ala. 400; Parkist v. Alexander, 1 Johns. Ch. 394; Reed v. Warren, 5 Paige 650; Billington's Appeal, 3 Rawle 48; Brown v. Brown, 1 Strob. Eq. 363.

2. The complainant is entitled to share in all the advantages acquired by the executor's various arrangements with the creditors, his purchases, and his settlements with other legatees.—He is the trustee for the common interest, and all these benefits enure to the common interest.—Jeremy's Eq. pp. 144, 543, 545; 1 Story's Eq. § 465; 2 *ib.* §§ 1210, 1211; 3 Rawle 48, *supra*; Bush v. Bush, 1 Strob. Eq. 377; and other cases cited above. The principle in Billington's Appeal applies on the converse state of facts.

3. The purchases made in February, 1829, of the eight negroes, and afterwards of seven others, were made on a satisfied decree, to which Givhan was a party, and of which satisfaction there was record evidence except as to $200. These eight negroes were sold separately, as shown by the separate prices in the register's report. The sale of Plenty then satisfied the decree, and the executor is liable for the other seven, as also for Sam and the hire of Bella. But, although Bella was sold last, yet, as all were sold at the same time, and no money was paid by the executor, the law will declare the decree to have been satisfied by the sale of Bella, and the executor will hold the rest as the property of the estate.

4. The sales of the negroes in February, 1829, and of Sam afterwards, were at the instance of the executor; and, though the sales were made by the commissioner, under an order of court, on a valid, unsatisfied decree, the executor cannot hold

them absolutely, but holds them, at the option of the parties interested, for the estate.—*Ex parte* Wiggins, 1 Hill's (S. C.) Ch. R. 353, and cases cited in opinion of Ch. Harper, particularly *Ex parte* James, 8 Vesey 337, where the trustee had made arrangements with the creditors. And although the facts are different, in regard to the three first bought in Charleston, the principles declared in all the above cases apply as to them.

5. If the trustee mingle the funds of the estate with his own, so that they cannot be distinguished, or only with great difficulty; or "if a new ingredient is formed, not capable of a just appreciation and division, according to the original rights of each, the trustee must lose the whole. This is insisted on as to all the purchases made in Alabama.—Story on Bailments, pp. 29, 31, § 40, and cases in notes; Story on Agency, § 205, and cases in notes; 1 Story's Eq. § § 468, 623; Hart v. Ten Eyck, 2 Johns. Ch. 62, 108; Lupton v. White, 15 Vesey 436, 440; Docker v. Somes, 2 Myl. & K. (8 Con. Eng. Ch.) 655; Myers v. Myers, 2 McCord's Ch. 214, 265. Nor is this rule too harsh to be here applied. There is nothing to induce a relaxation of the rule in Givhan's favor; the case is not within the principle of Bethea v. McCall. But, if overruled in this, it is insisted, that the executor shall be required to prove how much of his own money was used by him in these purchases, and whence obtained, and that he shall identify the money used as his own as the same received by him from his individual means; and that complainant should not be required to prove how much of the trust funds he used; also, that, if he held funds of the estate at the time of his purchases, he shall be declared to have purchased with these funds, and for the estate, if complainant so elects, unless he identifies as his own the money used.

6. The husband can bind the wife's personalty, only by reduction to possession, actual or constructive. When constructive, it is a question of intention, to be sustained by proof. Certain acts (as release, assignment for valuable consideration, &c.) are declared by law to carry with them conclusive evidence of the intention, and, when coupled with the power to reduce to possession, pass the wife's estate, or bind it, as to the personalty. In all other cases, the intention, situation, and act of the husband, rest in evidence.—Terrell v. Greene, 11 Ala.

207; 2 Penn. R. 71; Carleton & Co. v. Banks, 7 Ala. 32; Smith v. Scudder, 11 S. & R. 325; Lodge v. Hamilton, 2 S. & R. 491; Hind's Estate, 5 Wharton 138; Lewis v. Lewis, 3 Barn. & Cres. 291; Bates v. Dandy, 2 Atk. 207; Wildman v. Wildman, 9 Vesey 174; Earl Salisbury v. Newton, 1 Eden's Ch. R. 570.

7. And this, to defeat the wife's equities, must be done by an executed, not an executory contract.—Gillett v. Powell, 1 Speer's Eq. 142, 149; Hill v. Hill, 1 Strob. Eq. 25.

8. The dealings must be with the husband as such; there must be an exercise by him of his marital rights, with the view to bind the wife's estate. Any other dealing is on the husband's general credit; and, like other creditors, the executor can only claim a set-off, or reduction, subject to the wife's equities.—Lodge v. Hamilton, 2 S. & R. 491; Terrell v. Greene, 11 Ala. 207; Van Eppes v. Van Densen, 4 Paige 64; Lady Elibank v. Montolieu, 5 Vesey 737; Carr v. Taylor, 10 Vesey 575; Frankenfeldt's Appeal, 3 Wharton 415. Givhan does not allege, in his answer, any fact to charge the wife's estate with her husband's debts; and it is proved that the husband, up to his last transaction with Givhan, was in good credit, and of ample means.

9. The same principle prevails, as to the property passing from Givhan's possession to Montgomery's; whether purchases, or payments *pro tanto*, depends on the circumstances. There is no allegation in the answer that they were received from the executor as payments, or *quasi* advancements; his failure to allege it is conclusive that they were not so received. If the answer of Montgomery is excluded, no part of the evidence explains the transaction as to these negroes; but if his answer is looked to, the explanation is consistent with Givhan's answer, and all the circumstances of the case, that Hagar and child and the lot were a purchase, and that Jim was loaned as a nurse.

10. As to the Bank debt paid by Givhan: He was not a privy to the debt, nor bound by it; and he could not, without Montgomery's consent, pay that debt, and thus make himself a creditor of Montgomery, at least so as to charge the wife's estate. He does not say, in his answer, that he paid this debt with Montgomery's knowledge even.—Frankenfeldt's Appeal, 3 Wharton 415; Weakley v. Braham, 2 Stewart 500; Mayor

v. Hughes, 1 Gill & John. 433; Richardson v. McNairy, 1 Con. (S. C.) R. 472; 5 Cowen 603; 4 N. H. 138; 1 South. 213; Jones v. Wilson, 3 Johns. 434; Beach v. Vandenburgh, 10 *ib.* 361.

11. The defendants did not object, in their answers, or on the hearing, to the want of parties, or the lapse of time; and they will not be allowed to raise the objections now.

J. M. Boling and R. Saffold, *contra*:

1. The answers are responsive to the bill, and deny every material allegation, both general and special. The answers are evidence, not only so far as they deny the matters affirmatively alleged, but even where they affirm and avoid. Taking the case as presented by the record, the conclusion is perfectly just, that George Givhan had no agency in bringing on the sale of the negroes in South Carolina, and that he paid for them, after 1837, with his own means, mainly with money arising from the sale of the Hayneville lots. There is nothing in the record to impugn this sale. It is evident that he never made any valid promise to divide them among all the heirs. The farthest the testimony shows he went, was that he intended—nothing said that was consummated or binding. The record fully sustains this purchase, and that of the Hayneville tract of land, independent of the admissions.—Andrews & Bro. v. Jones, 10 Ala. 400.

2. The advances by Givhan for Montgomery, or Montgomery and wife, and the assumptions by him of the debts of Montgomery, and payments for him whilst he was solvent, were properly considered by the court below as advances on the faith and credit of Mrs. Montgomery's portion, and the executor was properly allowed to make the deduction from her portion.—Whether considered as advances on the faith of the legacy or uot, they were debts which the executor would be allowed to retain on settlement; he not being in a situation to sue himself. --1 Dess. 247; Purdom v. Tipton, 9 Ala. 914; Fonblanque's Eq., Book 4, ch. 2, § 4, and note; Levessey v. Levessey, 3 Russ. 287, 542; 1 Eq. Dig. 498, 813; 10 Peters 532; 2 Peters' Dig. 277; Toller on Executors, pp. 295 to 298: 1 Lomax on Ex., pp. 412 to 418; 7 Dana 457; 12 Pick. 173; 6 Mon. 257; 7 *ib.* 247; 1 Wash. 30; Pitts v. Curtis, 4 Ala.

350; 7 *ib.* 32, 589; 2 Gill & Johns. 81; 5 Johns. Ch. 196; 8 Porter 36; 1 McCord's Ch. 191; 2 Nott & McCord 151; 2 Murph. 151; 1 Hill's (S. C.) R. 191.

3. The proof must correspond with the allegations of the bill, to entitle the complainant to relief. The proof in this case does not sustain the allegations of the bill, particularly as to the sale of the slaves in South Carolina, which were bought by Givhan. The proof is totally different from the allegations as to this sale, and the complainant is not entitled to relief as to them; nor would she be entitled to relief, as to these slaves, if her bill were so amended that the allegations and proof would agree.—Clements v. Kellogg, 1 Ala. 330; Julian and Wife v. Reynolds, 11 Ala. 960.

4. The declarations of Givhan, that he intended the property for the estate, if such were made, were upon no consideration, and do not bind him. The most reasonable inference to be drawn from such declarations, is, that he intended the property for himself and brothers.—Doe *ex dem.* Davis v. McKinney, 5 Ala. 726; Lyles v. Sims, Harper's R. 42; 2 U. S. Digest, p. 365, § 108. Of the same character are the declarations of George Givhan and brothers, in the mortgage to the Bank, calling the property the slaves of the estate; and this mortgage was made, too, as the only terms on which the cashier of the Bank would grant the parties an extension of time on their indebtedness to the Bank. The admissions in the mortgage are only *prima facie* evidence, and may be rebutted by other evidence; no one being injured thereby, and they being made out of court, and not in a suit.—Gresley's Eq. Ev. 323, 355. Mrs. Montgomery and her husband received no injury from the description of the slaves in the mortgage as the property of the estate of Job P. Givhan.—2 Johns. Ch. 209, 222; Venable v. Thompson, 11 Ala. 147; Hunley v. Hunley, 15 Ala. 105.

5. The bankrupt act of 1841 operates on the estate of the person applying for its benefit, so as to transfer to the assignee not only property in possession, but actions pending, and mere rights of action; consequently, all the interest which the husband had, *jure mariti*, in the choses in action of his wife, passed to the assignee upon the filing of the husband's petition in bankruptcy. The bill should have been dismissed, if for no

other reason, because the assignee was not made a party.—Butler and Wife v. Merchants' Ins. Co., 8 Ala. 375; Hunley v. Hunley, 15 Ala. 105.

6. The answers of Montgomery and Mrs. Appleby are not evidence against Givhan.—Gresley's Eq. Ev. 24; Julian v. Reynolds, 8 Ala. 680.

7. An admission, made by counsel of record in a case, is conclusive, and cannot be retracted.—Gresley's Equity Ev. 350, 351.

CHILTON, J.—We have given to the record in this case a laborious examination, and proceed to state, as briefly as we can, the conclusions we have attained.

1. It is very clear, that the voluntary deed executed by the testator, and which, since his death, has been set aside by the Court of Chancery in South Carolina, can have no legitimate influence upon the decision of this cause; first, for the reason, that both the executor and the legatees under the will seem uniformly to have regarded it as inoperative; and, secondly, the bill proceeds under the will for distribution, and not under the deed, and the executor admits the receipt of certain property belonging to the estate, and which is embraced in the deed, in his capacity as executor, and his liability to account as such, but insists that the complainant has received her full share. As neither party insists upon the deed, we will lay that out of view, and proceed to ascertain the rights of the parties irrespective of it.

2. It is conceded, that the testator, Job P. Givhan, made his will, by which, after making certain dispositions of portions of his property, he directed that the balance of his estate, both real and personal, should be "divided, in equal parts, among his eight children." The complainant is one of his children, and entitled to share an interest of one-eighth in the estate. It appears, that Richard Appleby first qualified as executor of the will, the said George Givhan being then under age; that several judgments were rendered against him as executor, and that Appleby treated the deed, which disposed of the testator's slaves, and which was executed prior to the will, as passing the property. One of the creditors thereupon filed a bill in equity, and the deed was declared fraudulent and void as to pre-existing

debts; and the commissioner was ordered to take an account of the debts due from the estate, and to seize upon sufficient of the assets embraced in the deed for their satisfaction. The cause having been removed from the Charleston to the Colleton District, the commissioner of the Colleton District proceeded to state the account, ascertaining the sums due to the creditors, and to seize upon and sell divers slaves belonging to said estate.

At said sale, the defendant, Givhan, who was then one of the executors, purchased divers of the slaves; and the first question we propose to notice, is, whether this purchase is to enure to his individual benefit, or is to be considered a purchase for the benefit of the estate. The bill charges him with having procured the sale, and with having purchased with the means, and for the benefit, of the estate. In response to such allegations, the defendant states, that by the decree of the Chancery Court, setting aside the deed, it was decreed that the assets of the estate should be placed in the hands of the commissioner of said court, and that the commissioner should proceed to sell so much thereof as should be necessary to pay and satisfy the debts of the estate; that in pursuance of said order, the commissioner proceeded to sell thirty-seven of the slaves; that he does not recollect the amount of the debts, but avers that no money was left after paying the demands against the estate; that these thirty-seven slaves were all that belonged to the estate, except nine which the respondent had before that time brought to the State of Alabama. He denies that he received any portion of the proceeds of the sale, and says that he had nothing to do with the sales, or settlements. He admits that he purchased the following slaves, at the sales made by the commissioner, viz., Morris, Venus, Frank, Plenty, Scipio, Ellick, Sarah, and her two children George and Phibby; also Peggy, Linda, and Sam; that he paid cash for Sam, and may have raised the money which purchased him from a sale of the cotton made in Alabama with the negroes brought to this State; but in making this arrangement, he left debts due from the estate unpaid, which required him to pay out his individual funds in their extinguishment, to an amount greater than that used by him from the proceeds of the crop; that Sam died in less than a year after his purchase; that Peggy died in about three years after her purchase, and Scipio in about four years

thereafter; that as to the other slaves purchased by him, he paid for them out of the proceeds derived from the sale of town lots in Hayneville, two or three hundred dollars in the sale of horses and other individual property, besides some means which he borrowed, and the proceeds of cotton crops raised by nine hands, which he and his two brothers had, and of nineteen working hands, which he had in his possession during the years 1836 and 1837, of the estate of one Drury Fort, of which estate he was administrator. He denies that one dollar of money belonging to the estate, or arising from crops made by hands belonging to the estate of J. P. Givhan, was paid; but on the contrary, insists, that there were but five of said nine slaves capable of working, and that the proceeds of their labor did not support the children of the said Job.

The defendant also avers in his answer, that, upon his purchase at the commissioner's sale, which was made at Charleston, the Hamiltons agreed to extend the time of payment, and to give him a receipt for the amount of his bid against so much of their claim. The amount thus receipted was $1500, for which he gave his note to the said Hamiltons. The other portion of the slaves were purchased at Waterborough; and for the amount bid by him, it was agreed that the Hamiltons should indulge him, upon his executing a mortgage upon the slaves, and giving his bond for the amount, being about $1400; which mortgage and bond, it seems, were afterwards assigned to the Hamiltons, by the commissioner, in payment of their debt against the estate. These papers, together with a transcript of the proceedings in equity in South Carolina, appear in the record before us.

From the report of the master it appears, that the total amount of debts proved before him, embracing the demand due the Hamiltons, was $7565 45. The amount of the proceeds of the sales appears by the record to be $8012 50; thus leaving a balance of $447 05 as overplus, after paying the debts. To this sum should be added the price at which the slave Sam was afterwards sold, being $300, which makes the overplus, after paying the amount of the indebtedness of the estate as disclosed by the record, the sum of $747 05. What disposition, if any, was made of this sum, the record does not inform us.

Conceding that an administrator, or an executor, with an

interest, may purchase at a sale made of the goods of the estate which he represents, if the sale is conducted fairly and openly, as has been several times decided by this court; still, we think, there are circumstances connected with the sale and purchase of these eleven slaves by George Givhan, which show, beyond a reasonable doubt, that he concluded the purchase for the benefit of the estate, and not on his individual account. We do not propose to comment upon tne voluminous testimony of the numerous witnesses who have been examined, and which with much care we have sifted, but merely upon the leading facts in the cause which have led us to this conclusion.

In the first place, the record of the chancery proceedings in the State of South Carolina, presents the claim of the defendant in no very favorable light. It seems, by the proceedings had in that State, that, although the assets of the estate of Job P. Givhan were more than sufficient to pay all the debts due from it, still, expensive measures were resorted to unnecessarily to affect their adjustment. Instead of the executor's selling sufficient of the property to pay the debts, and distributing the residue as required by the will, the debts remain unpaid, and the creditors are driven to their bill, and the estate put to all the expense consequent upon a protracted suit in equity. It may be replied, that the mismanagement of Appleby, and not of Givhan, caused this litigation. There is no doubt, that the misconduct of the former originated it; but it is equally clear, that the defendant, Givhan, contributed to its continuance, at least in respect of the property which he purchased. He was qualified as executor in November, 1827, and in the same year was made a party to the bill, before the cause was transferred from the Charleston to the Colleton District, at which time only seven of the slaves had been sold, which brought $1115. He had, previous to that time, and before the commencement of the chancery suit, removed a portion of the slaves to this State; which circumstance the chancellor in South Carolina (Dessaussure) regarded as creating just suspicion against the parties, and which, no doubt, had its influence in the question of costs which were taxed against the estate, as well as in originating the proceedings. On the 14th May, 1828, the decree was rendered in the case of Hester A. Forde, subjecting the property embraced in the voluntary deed to the payment of her demand.

It will be observed, that hers was not a creditor's bill; she only prayed relief for an amount which, she alleged, was due her from the testator, and for which the bill sought an account. Three days after the decree in her favor, a decree was rendered, by the consent of the parties, that the commissioner in equity for Colleton District should "immediately proceed to seize as many of the negroes included in the voluntary deed, as may be sufficient to satisfy the demands of the creditors entitled to payment," &c.; and he was further ordered to sell the same and retain the proceeds in his hands, until he could advertise for the creditors of the estate to come in and prove their demands before him; after which he was ordered to marshal the assets, and to pay over the funds in his hands to such of the creditors as should prove their demands, according to their legal priorities.

In obedience to this last decree, the commissioner of Colleton seized seventeen slaves, and sold them for $4,830, from which he deducted expenses (say $135 86). This, added to the net proceeds of the sale of the seven slaves ($1,108 36), makes $5,802 50. Now, the amount of debts, exclusive of the demand of F. & M. Hamilton, embracing cost and interest, with the commissioner's fee for disbursements, was $4,576 35; leaving a balance of $1,226 25 in the hands of the register. It does not appear when the sale of these seventeen slaves was made; but it must have taken place between the time when the decree which authorized it was rendered, and the confirmation of the master's report, which was the 22d day of January, 1829. At this sale, George Givhan became the purchaser of only three of the slaves, viz., Frank, Morris, and Venus, which he bid off at $1,230. The master, in the report which gives an account of the sales, states, "that upon investigating the account of George Givhan, as one of the executors of Job P. Givhan, it appears that he has paid, on account of the estate, part of the demand

of F. & M. Hamilton,	$1,500 00
Other small charges,	25 00
Commissions at 2½ pr. cent.,	38 12
Making in the aggregate,	$1,563 12;

and has received nothing; whereby the estate is indebted to him in this amount. But as a claim by him to be paid out of

the assets of the estate in hand, to the exclusion of any other creditors, would lead to many intricate investigations; and as there are assets of this estate which will probably be recovered, the said George is willing to seek payment from them, leaving the funds in hand to the creditors here. It is therefore recommended, that the amount of $1,563 12 be decreed to be paid him by the estate of his said testator."

If this report correctly sets forth the facts of the case as they there existed, the conclusion irresistibly follows, that the $1500 receipt taken by George Givhan from the Hamiltons, in part for their debt against the estate of Job P. Givhan, was not received by the commissioner in equity in payment of the three slaves above named, as sold by him to said George; and further, that the arrangement made with the Hamiltons, at least so far as regarded the $1500 receipt, was for the benefit of the estate, which thereby became debtor to the said George, for the sum thus paid, or agreed to be paid, and for which he was then, as the record recites, willing to seek payment from the other assets of the estate. If we exclude from the debts to be paid out of the proceeds of the seventeen slaves this $1500, and allow the remainder of the claim of Hamilton with the costs, which amounted to $1,525 58, the amount of said sale only fell short of paying the entire indebtedness of the estate proved before the commissioner, by the sum of $194 83. It appears, however, by another report, that the commissioner proceeded on the 2d day of February, 1829, to sell nine other slaves, eight of which were purchased by said George Givhan for $1,910, and one by a stranger at the price of $300; and here the record closes, without giving us any further information as to what disposition was made of the proceeds.

The sale to the stranger for $300, was sufficient to have paid the remainder of the debt, and have left say $100 to meet the costs of the suit. It is manifest, then, that the eight slaves were sold for the benefit of George Givhan, to pay him the sum upon which he had procured indulgence from the Hamiltons; for, as to the demand insisted upon by H. T. Crumpton, that was rejected by the commissioner, as constituting no charge against the estate; the note upon which the judgment was rendered, having been executed by Applebly, and there being no proof that the estate was in any way bound for its payment.

The question then comes up, was it competent for George Givhan to avail himself of this demand, which he assumed to pay to the Hamiltons, to sell the assets of the estate under this general order of the Court of Chancery, which was made by consent, and to acquire a good title to the property in opposition to the estate? It will be remembered, that he paid no money upon the purchase of these eleven slaves; and the Hamiltons, of whom he obtained an extension of the time of payment, expressly state that the indulgence was granted for the benefit of the estate. Moses Hamilton swears, that the defendant, George Givhan, told him, at the time the indulgence was granted, "that his motive was to get time, in order to work the property to the best advantage to pay the debt, *so as to enable him to save the property for the benefit of the estate.*" Frederick Hamilton, who then resided in this State, deposes, that said George wrote to him, and stated, that if he would consent to the indulgence, and permit him to bring the slaves into this State, where he could have fresh and rich land to cultivate, it would enable him to work the slaves and pay this debt, without the property being sacrificed; and that the arrangement was made wholly for the benefit of the estate. Under these circumstances, we feel constrained to pronounce that the purchase at the commissioner's sale, did not vest in the said executor a title which he can successfully urge in opposition to the estate.

The general rule, applicable to all such cases, is, that a trustee is never permitted to make any profit to himself in any of the concerns of his tsust.—Docker v. Somes, 2 Myl. & Keene 664; 1 Story's Eq. § 465. "A trustee," says Judge Story, "is bound not to do anything which can place him in a condition inconsistent with the interest of the trust, or which has a tendency to interfere with his duty in discharging it; and this doctrine applies, not only to trustees strictly so called, but to other persons standing in like situation," &c. He also adds, that executors or administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business, or manage the assets of the estate.—*Ib.* § 322. The rule is well settled, that an administrator, or an executor, is not permitted to purchase up the debts of the deceased on his own account; but whatever of advantage is thus derived by him, by purchases at an under

value, is for the common benefit of the estate.—*Ib.* This rule is not founded upon the supposition, that there is always, in such cases, something morally wrong, but upon the policy of the law, withholding inducements to peculation and fraud—thus shielding the party from temptation.

In *Ex parte* Lacey, 6 Ves. 426, Lord Eldon, speaking of the purchase by an assignee, of the debts of a bankrupt, and of his estate, says. "In that respect, there is no difference between assignees and executors, who cannot, for their own benefit, buy the debts of the creditors. I do not say there may not be cases of that kind, in which, in a moral view, the transaction between the executor and the creditor may not be blameable; but the court must act upon general principles.—Unless the policy of the law makes it impossible for them to do anything for their own benefit, it is impossible to see in what cases the transaction is morally right." In *Ex parte* James, 8 Ves. 337, the same learned Chancellor said, "An executor cannot buy for his own benefit debts due from the testator's estate. Any stranger may; but the executor is bound to do his best for the estate." In Van Horne v. Fonda, 5 Johns. Ch. R. 388 (408), it was held, that an executor had no right or power to extinguish a mortgage or other debts for his own benefit, or to traffic with the estate for his own emolument: that he cannot be permitted to raise in himself an interest opposite to that of the party for whom he acts.—See, also, Tebbs v. Carpenter, 1 Madd. Rep. 300; Forbes v. Ross, 2 Bro. Ch. R. 403.

So in purchases by a trustee, other than executors or administrators with an interest, of the trust effects, it has been several times held by this court, that the *cestui que trust* can have the sale set aside by timely application to a court of equity.—Saltmarsh v. Beene, 4 Port. 283–293; McKinley v. Irvine, 13 Ala. 681; Cunningham v. Rodgers, 14 *ib.* 147; Harrison, adm'r, v. Mock *et al.*, 16 *ib.* 616. In Harrison and Gardner, adm'rs, v. Mock, 10 Ala. 185, it was held, that where a trustee, after the acceptance of the trust, caused a sale of part of the trust property to be made under execution for his own benefit, and became himself the purchaser, he would be considered as having purchased in his character of trustee, for the benefit of those concerned in the trust.

On the other hand, as respects executors and administrators,

as we before said, the doctrine of this court as first settled in Brannan v. Oliver, 2 Stew. R. 47, and explained in Saltmarsh v. Beene, 4 Porter 283, and affirmed in McLane v. Spence, 6 Ala. 894, is, that where they have an interest in the property purchased, they may conclude the purchase for their own benefit; provided there is no unfairness, and the property is exposed to sale in the usual and ordinary mode, and under such circumstances as will command the best price. The case before us does not come within these decisions of our court. Here the property was not sold in the ordinary mode: a bill is filed for the ascertainment and payment of one debt, which, *by consent*, is invested with the properties of a creditor's bill; and the assets, instead of being duly administered upon and sold in the ordinary mode for the satisfaction of the debts, are turned over to the commissioner in equity, who makes a forced sale. The executor avails himself of an indulgence or credit given to the estate, to become the purchaser of the property. Upon $1500 of that sum he is allowed two and a half per cent. as executor for making the payment for the estate, and then avails himself of the debt, as though no indulgence had been given or payment made, to purchase in the property, as upon a cash sale. To hold that such purchase would vest in him a title to these slaves, in opposition to the estate, would be to extend the doctrine asserted in Brannan v. Oliver, and to fritter away a most salutary rule, conceived in the profoundest wisdom; which is, that the beneficial arrangements made by an executor of an estate, with the creditors thereof, shall enure not to him individually, but to the common benefit of the estate.—1 Story's Eq. (4 ed.) § 322, p. 348, and the authorities cited in note 4; 2 Hen. & Munf. 245; 1 Dess. 150.

If, however, we were mistaken in the application of this rule of equity to this case, we are, in the second place, very clearly of opinion, that there is a strong preponderance of the proof in favor of the proposition that these eleven slaves were purchased by George Givhan for the benefit of the estate. The two notes given by George Givhan to the Hamiltons, for the $1500, were executed by him as executor of his father's estate. He was allowed commissions of two and a half per cent. upon the same, as so much paid by him for the estate. In addition to his repeated declarations, at various times, that he had bid

in the property for the estate, and his recital of the fact in the mortgage given to the Bank, he told P. R. Appleby, at the time of the sale, "that he was bidding in said slaves for the benefit of the estate, and that he was to work the property to the best advantage, to pay the debts and save the property for the estate." This testimony, connected with the evidence of the Hamiltons, above alluded to, and the proof of Geo. Givhan's admissions, made by the witnesses W. Givhan, Wm. Crenshaw, H. M. Phillips, E. Marven and others; as also with the fact, that at the time of the purchase, and for several years thereafter, said George had no property of his own; and with the further fact, that the bills of sale for the slaves, and the mortgage given by him to the commissioner, were not executed until more than a year after the purchase: all these considerations impel us to conclude, that, whatever may have been his intention after he had bid off the eleven slaves, at the time of the purchase he designed them, and bid them off, for the benefit of the estate of which he was the executor; and he must be regarded as holding them in that capacity, and liable to account for them as assets of said estate.

In respect to the payment for these slaves, we think the allegations of the bill are unsustained by evidence. The proof on this point is wholly insufficient to overcome the positive averment in the defendant's answer, in response to the bill, that not one dollar belonging to the estate was used in making the payment; and while the defendant must be held to account for the slaves, and their reasonable hire, or the profits of their labor, if such can be ascertained, he is entitled to have an account of the money he paid out for the estate, which will be allowed him with interest from the payment thereof.

But it is insisted, that this shows a variance between the proof and allegations of the bill, and that upon this ground the relief should be denied. We do not think the objection can be sustained. The *gravamen* of the bill is for an account against the executor, who is charged to have in his possession, and to be liable for, certain assets belonging to the estate; and these eleven slaves are charged to constitute a portion of those assets. The bill charges that they were purchased with the funds of the estate. This, we find, is not proved; still, they are assets, and the plaintiff's right to have the executor account for them is

sufficiently made out; and this is substantially the right claimed by the bill. That the defendant, instead of the estate, paid the demands under which, it is alleged, they were sold, does not show a title to relief variant from that set up, but is important only upon the accounting, as affecting the amount to be recovered. That the executor paid for the slaves with the funds of the estate, is only one of several reasons assigned by the bill why they should be regarded as assets. The allegation may, therefore, well be rejected, and the plaintiff's title remain the same.—See Gresley's Eq. Ev. 170, *et seq.*; 2 Dan. Ch. Pr. 1000-1-2.

In respect of the profits arising upon a sale of the Hayneville lots, and the proceeds or profits of the land in South Carolina, on which was located the ferry, as also the ten slaves purchased of Scott, we are distinctly informed by the record, that at the hearing of the cause in the court below, the solicitor for the complainant abandoned all claim for them. When an admission is thus made, which obviates the necessity of introducing proof in the court below, to rebut the plaintiff's claim, it cannot be withdrawn in this court, so as to render a decree irregular, made in conformity with such admission. Further, "if the fact is admitted by the attorney, on the record, with the intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission."—Gres. Eq. Ev. 39. But, laying the admission of the solicitor out of view, we agree with the Chancellor, in the opinion that the complainant is not shown by the proof to be entitled to a decree on account of these items. It is true, that some declarations of the defendant are proved, which tend to establish the contrary; but they are not sufficient to overcome the positive denials of the answer, which, in respect to two of the items, is very fully sustained by the proof. Neither is it satisfactorily shown that the executor has used the funds of the estate in the purchase of other property. On the contrary, it pretty satisfactorily appears, that the purchases were made with the means and moneys of the defendant, arising from the sale of his Hayneville town lots, and other accruing sources of income, which are set forth in the answer.

The conclusion which results from these inquiries, is, that the defendant, George Givhan, should be chargeable with, and

should account for, not only the nine slaves which he brought from the State of South Carolina, and their increase, together with the annual profiits arising from their labor, as also for the five thousand dollars for which the lands belonging to the estate situate in Lowndes County were sold, and the interest on the same (which is the decree rendered by the Chancellor); but he should also be decreed to account, as executor, for the twelve slaves purchased by him in South Carolina, together with their increase and the annual profits of their labor. These items must be regarded as composing the estate of Job P. Givhan, for which the defendant as executor should be held responsible, deducting the expenses of such as could render no service, and crediting him for such of them as have died.

It remains to consider, what portion of the complainant's share of the estate she has received, and what credits should be allowed the executor upon the accounting. And, first, we are clearly of opinion, that he ought to be allowed all reasonable charges for boarding, clothing, and expenses incurred in educating the complainant; and although such expenses should exceed the interest or annual profits arising upon the complainant's share, still, if they were under the circumstances necessary, and such as a Court of Chancery would have decreed, they should be allowed.—Clay's Dig. 268; Stewart, guardian, v. Lewis, 16 Ala. 734. On the other hand, if the complainant, while residing with the said executor, who was also her guardian, performed services for him, she is entitled to set-off the value of these services against this demand for board, &c., as far as it may go.

In the next place, we think the executor should be allowed for the board of the said complainant and her husband, and for the keep of their horses, so far as these items are shown to exist by the proof and were not intended as gratuitous. We think it but a reasonable inference from their continuing to board with the defendant after the marriage, as the complainant had done before (the defendant having in his hands the share of the estate to which they were entitled), that it was understood between the parties the price of the board should be charged to the effects in the hands of the executor, in the absence of any agreement that the same should be otherwise settled; and that the disallowance of such item, now that the husband is insolvent, would be

inequitable and unjust. If, however, the husband of the complainant contributed provisions and the like, which were consumed by the family, or the wife rendered services, these should be allowed.

In the third place, we think the three negro slaves which were turned over by the executor to the complainant and her husband, should be considered a payment to the extent of their value at the time of the delivery, and allowed the executor upon accounting. It is shown that they have continued in possession of complainant and her husband, down to the time of the exhibition of her bill. In the mean time, the husband has become insolvent, and has availed himself of the benefit of the bankrupt law. It is not shown that he now asserts any claim to these three slaves, or that his marital rights have attached to them. They may, then, be considered as subject to the wife's equity, as property belonging to the estate, since they are in possession of herself and husband, and the latter assents by his answer to the claim of complainant to have her share of the estate settled upon her, and no proposal is made by either of them to return the slaves to the estate, or to account for their hire. While she shall receive, she must do equity, and the slaves being retained by her, she should be charged with them.

With respect to the indebtedness of R. B. Montgomery to the executor, both for the town lot sold, and moneys loaned or paid out for him, which dealings had no reference to the estate of the wife in the hands of the executor, and were not designed to be credited to that fund, we think it very clear from the authorities, that the complainant's right to a settlement remains unaffected by it. We had occasion to examine this question in the case of Savage, adm'r, v. Benham, at the present term; and we there held, that where the husband of a legatee receives money from the executor, not *as husband* in payment of the legacy, but under a contract to refund the same, the wife's equity remained unimpaired. With this decision we are satisfied; and as it is decisive of this point, it is needless to add more upon it. If, upon the accounting, it should turn out that the portion of the estate which belongs to the wife, to-wit: one eighth, should be more than adequate to the decent support of her-

self and children, and Robert B. Montgomery should be indebted to the executor after balancing the accounts between them, the executor should be allowed to retain the balance due him, after making a suitable settlement upon the wife.

That the executor has made a settlement with another of the legatees, by which the latter may have recovered and received less than was actually due, does not entitle the complainant to receive more than her appropriate share.—She is entitled to her share as though no settlement had been made with any of the others. If too little has been paid, it is the moral duty of the executor to pay the remainder, if it cannot be enforced by judicial interposition; and for aught that this court can know, the proceedings determining the amount of the executor's liability may yet be opened, and the proper amount decreed. Be this as it may, we do not feel justified in taking the share properly belonging to one distributee and conferring it upon another.

It results from the views which we have taken, that the Chancellor both mistook the facts and misconceived the law in his decree. It must consequently be reversed, and the cause must be remanded, that the matters of account, &c., may be referred, and a final decree rendered in conformity with the priciples above laid down.

Note by the Reporter.—This opinion was pronounced at the November term, 1849, but has never been reported.

REPORTS

OF

CASES ARGUED AND DETERMINED

At June Term, 1854.

STEIN *vs.* THE MAYOR, ALDERMEN, &c., OF MOBILE.

1. The contract between the corporate authorities of Mobile and Albert Stein, by which the latter became the lessee and proprietor of the City Water Works for the term of twenty years, does not exempt his interest in said water works from taxation by the city, inasmuch as the contract contains no stipulation for such exemption. (Re-affirming Stein v. The Mayor &c. of Mobile, 17 Ala. 234.)
2. The only legitimate object of taxation is, the support and maintenance of the government; but this does not mean the expenses incurred by the mere machinery necessarily employed in its administration and conduct: the power extends to the employment of all those means and appliances which are ordinarily adopted, or which may be calculated, to develop the resources of the State, and add to the aggregate wealth and prosperity of her citizens; such, for example, as providing outlets for commerce, opening up channels of intercommunication between different parts of the State, improving the social, moral and physical condition of her people by wholesome police regulations, and by a judicious system of public instruction, as also for the protection, security and perpetuity of her government and institutions.
3. The power to levy a tax for local purposes may be delegated by the Legislature to a municipal corporation; it is no objection to an act delegating such power, that it requires the assent of three-fifths of the tax-payers to be obtained before the tax is levied; and the fact that the railroad, to aid in the construction of which the tax is imposed, extends beyond the limits of the city, or even of the State, does not render it less local, or in any way affect the validity of the statute or of the tax.
4. The acts of January 5, 1850, and December 20, 1851, authorizing the corporate authorities of the City of Mobile to levy a tax on the owners of real estate within the limits of the city, to aid in the construction of the Mobile and Ohio Railroad, are not unconstitutional.

5. The City Water Works of Mobile are taxable as real estate by the corporate authorities of the city; and a lessee who holds under a contract with the corporation, by which he acquires all their corporate rights and privileges in the water works for the term of twenty years, and in perpetuity if not then redeemed by the city, is liable for the tax assessed against said water works.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS case was submitted to the decision of the Hon. Alex. McKinstry, upon the following agreed statement of facts:

"The mayor, aldermen and common council of the City of Mobile, being entitled to certain water privileges, for the benefit of the citizens of Mobile, in the waters of Three Mile Creek, under the act of December 20th, 1820, and other acts subsequently passed on the same subject, on the 26th day of December, 1840, granted or leased to said Albert Stein the sole right to supply the said city with water; which contract and agreement is hereto attached, as a part of this case. In accordance with this contract, the said Stein erected the works now known as the Mobile Water Works. These works are composed as follows: The water is introduced into two reservoirs on the banks of the Three Mile Creek, from a point on said creek; said reservoirs being outside of the city limits. The water is then brought into the city, by means of cast-iron pipes, of about eight inches bore, passing along Spring Hill road, to a reservoir within the city, about two miles from Mobile River; this latter reservoir is located on a lot belonging to said Stein. By means of said iron pipes, which are buried three or (*four ?*) feet under ground, the water is conducted into the city, and along the streets; and by means of small lead pipes the water is carried, from the main pipes under ground, into the houses and lots of the citizens, who pay to the said Stein stipulated prices therefor annually.

"The Legislature of Alabama passed an act, approved the 20th December, 1851, entitled "an act to authorize the corporate authorities of the City of Mobile to levy a special tax, for the purpose of aiding the Mobile and Ohio Railroad; which act, and the act to which it refers, passed on the 5th January, 1850, are made parts of this agreement. Under and by virtue of this act, an election was held according to the provisions

thereof, at which the real estate owners, who had paid on their stock over twenty per cent., voted, with others, in favor of said taxation; but said Stein did not vote at said election, and has by no act sanctioned the law authorizing said taxation. At said election, a large majority was found to be in favor of said law; and the same went into effect according to its provisions, under and by authority of which a tax of two per cent. has been levied on said water works; valuing the same at $75,000, and making a tax of $1500, which they claim and are enforcing by the proceedings directed by said act.

"It is agreed, also, that all ordinances of the City of Mobile, and all existing acts of the Legislature, touching the said water works, may be considered in evidence, and before the court, and may be referred to, as a part of the record, by either party, before this court or the Supreme Court.

"The questions for the court are: 1st, whether said tax law is constitutional, and can be enforced; 2nd, whether said water works come witl in the act, and are taxable under it; and, 3rd, if so, whether Stein, the present proprietor or lessee, is liable for said tax."

The contract under which Stein became the lessee of the City Water Works, above referred to as being "hereto attached as a part of this case," nowhere appears in the record, but it is substantially stated in the report of the case of Stein v. The Mayor &c. of Mobile, 17 Ala. 234.

His Honor, Judge McKinstry, held, "that the said acts of the Legislature, above referred to, are constitutional, and may be enforced; that said water works come within the provisions of the act, and are taxable under it; and that Stein, being the owner of the land, and of the pipes and privileges attached to said land, and in possession thereof, is liable to pay said tax;" and judgment was accordingly rendered against Stein, as on a special verdict, for the amount of the tax assessed against said water works. This judgment is now assigned for error.

F. S Blount and John T. Taylor, for appellant:

The questions arising upon this record are three: 1st. Whether the third and subsequent sections of the act of the Legislature to amend and explain "an act to incorporate the Mobile and Ohio Railroad Company," approved 5th January,

1850, and "an act to authorize the corporate authorities of the City of Mobile to levy a special tax," are constitutional and can be enforced; 2nd. Whether the Water Works described in the record come within the act, and are taxable under it; and 3d. Whether the plaintiff in error, the present lessee, is liable to pay the same.

It is conceded that the power of taxation is inherent in every sovereignty, and extends not only to the people and property of a State, but it may be exercised upon every object brought within its jurisdiction. While this admits of no doubt, there are certain restrictions imposed upon the taxing power in its application to the purposes for which taxes are imposed, as well as upon the manner in which they are levied. The chief and only legitimate object of taxation, according to the theory of our republican institutions, is for the purpose of raising revenue for the support and maintenance of the Government. Where all the members of a political confederacy are equally entitled to the benefits, which the proper administration of the Government confers upon all alike, so all are equally liable to the support of the Government. Not indeed in the same amount to be contributed by each one, but in proportion to their ownership of those articles of property which are declared to be the subjects of the taxing power constitutionally exercised. If taxation is then restricted to raising the necessary revenue for the support of the Government, it must necessarily follow, that when taxes are imposed for other purposes than those strictly applicable to the use of the State as a sovereignty, and to be disbursed by the State for the equal benefit of all its citizens, such taxation is an unwarrantable and unconstitutional assumption of power, not conferred upon the Legislature, and in its tendencies destructive of the privileges and rights of its citizens.

The first proposition in the series presented questions the constitutionality of the acts of the Legislature therein mentioned, and denies its right to levy the taxes for the benefit of the corporation therein named, and in the manner and upon the property therein set forth. It is insisted: 1st. That this is investing in a few private citizens separate and exclusive privileges, in violation of the first section of the first article of the Constitution; 2d. That it is a delegation of State sovereignty to a private corporation, in derogation of the equal rights of

every other citizen of the State to share therein; 3d. That said laws are partial in their operation, being confined to the City of Mobile; 4th. That they are unequal in their application, being restricted solely to the real estate owners in the city of Mobile; 5th. That they are unjust, arbitrary and oppressive in these particulars: 1st. That the owners of real estate in the City of Mobile are taxed 2 per cent. per annum, for five years, upon the value of their real estate, without any just benefit or equivalent therefor; 2d. That the personal estate of the citizens of Mobile is exempt from taxation by these acts, and that there is no good reason shown for said exemption; 3d. That the real estate of the stockholders in said Mobile and Ohio Railroad Company is exempted from this taxation in this: that those who have personally subscribed to the stock of the said company, shall, for all sums paid on said stock over and above 20 per cent., be allowed to deduct the same from the tax collectable under this act; 4th. That that portion of said stockholders residing in the City of Mobile, voted to tax the property of the real estate owners for their personal benefit and emolument; the tax so raised going towards the building of said road, which, when built, or as far as built, is the private property of said stockholders; 5th. That the tax so raised is not appropriated to any public use, but takes from one citizen his property and vests it in another without any consideration, and in this case, against his own consent; 6th. That the provision of the law authorizing the tax payer to receive script in the stock of the company, makes the tax a forced loan without corresponding value received, as the stock of the company is worth only 60 to 70 cents in the dollar, and the tax payer is compelled to pay cent per cent; 7th. That by the operation of this law, the citizens of Mobile, owning real estate, are taxed for the benefit of the citizens of Mississippi, Tennessee, and Kentucky, owning stock in the railroad, and to build a road three-fourths of which is without the jurisdiction of the State of Alabama.

It will hardly be contended, that the Mobile and Ohio Railroad Company is not a private corporation, composed of private individuals, who, to promote private fortunes, and to reap the advantages of private enterprise, have associated themselves together. The fact that the Legislature has clothed them with

corporate powers to build a road, invests them with no other prerogative than would belong to an individual citizen embarking in the same enterprize. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality—properties by which a perpetual succession of many persons are considered the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers upon it political power or political character, than immortality would confer such power or character on a natural person. It is no more a State instrument, than a natural person exercising the same powers would be."—Dartmouth College v. Woodward, 4 Wheaton's R. 636.

Can this corporation, then, which is purely private, be clothed with the power belonging to the Legislature to levy and collect taxes, or rather to have taxes levied and collected for its benefit. Shall it be private in its ownership, in its direction, in its interests; public in its rights and privileges—a private speculation, an investment of moneys belonging to private persons, yet clothed with the sovereign power of having taxes levied for its purposes, and their application uncontrolled. Are the rights of the citizens of Mobile to their real estate inferior and subordinate to the right of this corporation to exact from them a per centage on its value for five years. If so, the creature of the law is beyond the constitution; the privileges granted to it by

the Legislature are above the inhibitions of the fundamental law, from which the Legislature itself derives its power; and we have, if this right is to be sustained by the judgment of this court, a clear illustration of legislative usurpation affecting the dearest rights of the citizen, and, in its results, revolutionizing the government. The essence of all political power is from the people, because, as to every political right they are sovereign. In forming the Government of the State of Alabama, there are certain rights enumerated in the Constitution, which are excepted out of the powers granted by that instrument. It is expressly declared that this enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and all laws contrary to the enumerated or retained powers shall remain void.—Art. 1, § 30.

There is but a single section in the Constitution in relation to taxation, and it is in the following words: "All lands liable to taxation in this State shall be taxed in proportion to their value." —8th Section, VI Article. Whence, then, is the power of levying taxes derived by the Legislature? Certainly from the sovereignty of the political body or people. But the Legislature is not a soverignty. It is the mere authorized agent of the constitution or organic law, and is limited, restricted and controlled by the words and terms of the instrument by which itself is created. The power to levy taxes for the support of the Government is an implied one under our constitution, and cannot be extended beyond the means necessary to the end. Were this not so, the power of taxation which the Legislature could exercise, would be boundless and unrestricted, confined to no object, limited by no end. It cannot be seriously contended, that there is no check to the exercise, either arbitrarily or inconsiderately, of this power by the Legislature, which, of all the other powers of government, has been most jealously guarded and restrained, both in England and this country, from the time of Magna Charta to the present hour. And it may be said to have been the fruitful mother of revolutions, each one nobly and successfully asserting the liberties of the subject and citizen. In England, during the reign of Charles I, the right to levy ship money was introduced in the year 1634. "The first writs of this kind had been directed to sea port towns only; but ship money was at this time levied on the whole kingdom, and

each county was rated at a particular sum which was afterwards assessed upon individuals. The amount of the whole tax was very moderate, little exceeding two hundred thousand pounds. It was levied upon the people with equality. The money was expended upon the navy, to the great honor and advantage of the Kingdom: as England had no military force, while all the other powers of Europe were strongly armed, a fleet seemed absolutely necessary for her security, and it was obvious that a navy must be built and equipped at leisure during peace; nor could it possibly be fitted out on a sudden emergence when the dangers became urgent; yet all these considerations could not reconcile the people to the imposition. It was entirely arbitrary. By the same right any other tax might be imposed; and men thought a powerful fleet, though both very desirable for the credit and safety of the Kingdom, but an unequal recompense for their liberties, which they apprehended were thus sacrificed in obtaining it."—Hume's History of England, 5th vol., p. 79. The Great Charter exacted by the Barons from King John at Runnymede on the 15th June, 1215, embodies the great principles of English liberty. In the language of an eloquent writer, "to have produced it, to have preserved it, to have matured it, constituted the immortal claim of England on the esteem of mankind." In declaring that "no scutage or aid, except in the three general feudal cases, the King's captivity, the knighting of his eldest son, and the marrying of his eldest daughter, shall be imposed, but by the great council of the kingdom," the principle is broadly stated, so resolutely defended by every Englishman, that the consent of the community is essential to just taxation. With us, that consent can be expressed in only one way, and that is in the words of the constitution. And the same spirit which induced the illustrious Hampden to oppose this tax, to brave the whole power of the court, and to sacrifice his fortunes to the defence of the liberties of the people of England, animated our revolutionary fathers in their stern opposition to the tea duties and stamp act. In this case, while the plaintiff in error admits the legislative right to levy taxes, he insists that there is a constitutional limit to the right; and that the Legislature, in authorizing the mayor and aldermen and common council of the City of Mobile to levy taxes on the citizens

of Mobile, which were to be paid over to the treasurer of the Mobile and Ohio Railroad Company, usurped a power they did not possess under the constitution, and granted to the set of men composing that company exclusive privileges, not in consideration of public services, and in derogation of the equal rights of the citizens of the State of Alabama.

It may be argued, that the consideration for the right of taxation was the benefit which would accrue to the City of Mobile in the increased value of her real estate, the great population which would inhabit within her limits, and her increase in business and wealth. To this it may be answered, that the same argument applies with equal or greater force to the owners and proprietors of the steamboats navigating our waters, and bringing the great staple of the South to our market; yet who would be wild and visionary enough to assert that the Legislature had the power to tax any interest in our city for the benefit of the owners of steamboats, compelling the proprietors of such interests to take stock in steamboat companies, and authorizing a sale of their property if such tax were not paid. Can anything be conceived more arbitrary, tyrannical and unjust? and yet, no one can point out the difference between the two cases; both common carriers; both receiving toll or compensation for transporting passengers and goods; both *private* property, owned by *private* individuals; and both, so far as a public benefit is concerned, upon a perfect equality. The difference in favor of the steamboats is, that they navigate wholly *within* the State, are owned *within* the State, and their disbursements are wholly *within* the State; thus adding capital, encouraging labor, and performing, as effectually as railroads, their engagements to the public. Why are they not equally entitled to be the recipients of legislative munificence with the Mobile and Ohio Railroad Company, and have a tax imposed upon the *personal* estate of the City of Mobile, as a set of men entitled to exclusive privileges, in consideration of public services?

But it may be said, that this is a tax levied by the corporate authorities of the City of Mobile, with the consent of three-fifths of the tax payers of the city who own real estate liable to taxation. Without stopping to examine the right of a guardian to bind his ward, by voting for this tax, or the tenant to bind

his lessor, as authorized by the act of 1851–'2, it may be replied, that the City of Mobile is a municipal corporation, acting under the authority of a charter—that whenever any provision of that charter contravenes the rights of sovereignty of the State or its citizens, it is absolutely void, and the fact that it was granted by the Legislature gives it no other or greater efficiency than it would have without such grant. It will hardly be contended that the object of a municipal incorporation is to erect stock banks or trading institutions, or if put in operation by *private* means and owned by *private* citizens, to compel her citizens to contribute, by taxes, to swell the capital and extend the stock list of such an establishment. And yet, this is a public benefit to the mercantile interests of a city, and an indispensable agent in mercantile transactions ; yet who would defend so odious a scheme, as a compulsory measure, within the power of the Legislature, to interfere with the private pursuits of the citizen, by compelling him to embark his property, against his will, in the business of stock banking ? "For imposing taxes upon us without our consent," was one of the charges contained in the Declaration of Independence against George III; and it makes but little difference with the principle, whether the tax goes into the treasury of a tyrant, or into the coffers of a corporation, sovereign and despotic in the usurped power of taxing the citizen.

But, it may be said that the tax is returned to the payer in the stock of the company; and what does this prove? Simply, then, that it is a FORCED LOAN ! What if the speculation fall through ? For many causes combine to defeat it. Why, then, the tax payer loses his money, and is consoled by the reflection that, by unwise and unconstitutional legislation, he has been deprived of his property, embarked against his wishes and his judgment, in visionary speculation.

It will, doubtless, be argued that the clause of the constitution which we have been considering, (§ 1, Art. I,) has no application to this case, because the right or power of taxation is not granted to the railroad corporation, but to the corporate authorities of the City of Mobile, and thus the objection is eluded—doubtless perceived by the friends of the railroad before the measure was perfected. "Whatever is done in fraud of the law, is done in violation of law," is a sound legal max-

im; and whatever is done in fraud of the constitutional rights of the citizen, is done in violation of them and of good government. The Railroad Company is made the recipient of the moneys collected under the law; the acts for its benefit contain the power, vested in the corporate authorities of the City of Mobile, to levy the tax; and as it was not one of the objects of the creation of the city government of Mobile to build railroads, and did not enter into the intention of the Legislature in granting its charter to vest it with any such power; and as it has no power, either under its charter, or by virtue of the law under which the tax is collected, of receiving, controlling, or in any manner directing or disposing of the fund, it is very evident that it acted merely as the agent of the legislative will.

Will hyper-criticism suggest, that the clause of the constitution which has been considered (1st section and 1st article) has no application to a case of this character, but must be confined to that class of cases where the privilege or emolument is personal and individual, and embraces no questions of property? If so, what is the definition of privilege? "A particular and peculiar benefit and advantage, enjoyed by a person, company or society, beyond the common advantages of other citizens."—Webster's Dict., "Privilege." It would be a difficult matter to imagine a more peculiar benefit enjoyed by a company beyond the common advantages of other citizens, than the right or benefit of having private property taxed and the money paid over to the company.

This case has been considered with reference to the constitutional powers of the State of Alabama to pass the acts in question, and the right is denied, because it is contended that without constitutional sanction it would be usurpation in the Legislature, and a violation of the sovereignty of the citizens of any particular section of the State, and of all the citizens of the State, which it is insisted is indestructible, inherent in them as citizens, and which cannot be divested out of them, unless by the acts of a convention to form a constitution, and the express grant of the power in question.

It is true that decisions in other States may be found, where cognate questions have been decided in favor of the power contended for. Yet in all or most of the States where these decisions have been made, they have been attempted to be sustained

upon the grant of some express or implied power contained in the State constitution. Yet they all present the fact that the same objections have been urged, and with a directness of application, a power of analysis, and a cogency of argument that was unanswerable. The case of The Police Jury of the Right Bank, &c., v. The Succession of John McDonough, was decided at the June term, 1853, of the Supreme Court of the State of Louisiana. Upon an examination of this case, it will be found that the constitution of Louisiana expressly provides for aid to railroad and other improvements within the State. And alluding to the fact, C. J. Slidell, who delivered the opinion of the court, holds the following language. "The constitution of 1852 was not in existence when the act of March, 1852, was passed. That act is not inconsistent with the letter nor the spirit of the constitution of 1852, and consequently remained in force after its adoption under the conservative effect of the article 143. It is inadmissible to suppose that the convention which assembled after the passage of that law, and done its labors on the 31st July, 1852, was ignorant of its provision. One of the reasons why a change of constitution was desired, as is well known and forms a part of our political history, was the popular wish to disembarrass some of the trammels of the constitution of 1845. One of them was a prohibition to pledge the faith of the State for any bonds, bills or other contracts, or obligations for the benefit or use of any person or persons, corporation or body politic whatever. In this respect a grave change was made by the constitution of 1852; whether wisely or imprudently, time will determine." "The Legislature was authorized thereafter to grant State aid to companies or associations, formed for the exclusive purpose of making works of internal improvements, wholly or partially within the State.—The subject of internal improvements then occupied intensely the public mind. The people assembled in convention were determined to place it in the power of future Legislatures to foster and encourage them." And until the people of Alabama assemble in convention, and authorize future Legislatures to exercise the power contained in the acts heretofore cited, if enforced against any of the citizens of the State, it can only be done by legislative usurpation and judicial legislation.

Separate and apart from the legal question which this case

presents to the court, there are others of a grave character growing out of political considerations, which must, sooner or later, be productive of the most serious disturbance in our political system. Chartered monopolies of every character are inimical to republican institutions. The aggregation of wealth with chartered privileges must find its sphere of action among those classes of our citizens who are not favored either with the advantages or exemptions with which they have to contend. The purity and simplicity of the government becomes complicated, by having its energies controlled, and its legislation hampered by the injudicious divestiture of constitutional powers, which it has conferred upon corporations without power of resumption, as it cannot impair the obligation of its contracts. And however desirable it might be for the States within which works of every kind tending to the advancement of the energies, wealth and prosperity of its people are projected, to lend their fostering aid, it is the part of wisdom for her Legislature, courts, and people, to remember, that every successful assault made upon the constitutional rights of any, the meanest of her citizens, lessens the tie which bind them to their government, destroys their reverence for their constitution, which affords them no protection at the hands of their Legislature or their courts, and fits them for any change, be it despotism or anarchy.

II. The second question presented for the consideration of the court is, whether the water works come within the act and are taxable under it. The act of December, 1820, creating the Mobile Aqueduct Company, is the only original charter by which the present water works belonging to the city exist.—Various enactments were subsequently made in 1824 and 1837. On the 26th December, 1840, a contract was made between the corporate authorities of the City of Mobile and Albert Stein, which was subsequently confirmed by the act of the Legislature, approved January 11th, 1841. By the operation of the various acts referred to, the franchise was vested in the corporate authorities of the City of Mobile. As such, it was not the subject of taxation when the franchise and the taxing power were united. The question then is, whether under the agreement made between the city authorities and Mr. Stein this franchise is liable for the taxes authorized by the acts of 1851 and 1852 herein before set out. It may be well to remark

here, that this court has decided, that the water works were subject to taxation for municipal purposes; but with every respect for the opinion of the court, I think the decision is erroneous, and that the error consisted in regarding the franchise as the private property of Mr. Stein, and the apparent incongruity of the city taxing its own property.

The act of 1851, by the first section, confirms the agreement made between the city authorities and the plaintiff in error.—By the second section, "all the rights, powers, privileges and immunities, which were granted to the Mobile Aqueduct Company, and the mayor and aldermen of the City of Mobile, by act of 30th December, 1820, not inconsistent with the terms of the before mentioned agreement, be, and the same is hereby, granted, vested in, and confirmed to the said Albert Stein and his assigns. By the third section, "all the rights, powers, privileges and immunities which were granted to the Mobile Aqueduct Company and to the mayor and aldermen of the City of Mobile, by the act of 25th December, 1837, be, and the same is hereby, vested in, and confirmed to, the said Albert Stein and his assigns·" Now Mr. Stein has a right to defend the possession of the franchise from taxation, by the virtue of the terms of his contract. Whatever rights, powers, privileges or immunities, were had, held, exercised or enjoyed, they were conveyed to him precisely in the same manner and in no other, in which they were possessed and held by the City of Mobile. The agreement contains no reservation of the taxing power. It is a contract between the parties, and is the law agreed upon between them. The city has no more right to interpolate or add a new term to the contract than has Mr. Stein. Any law, whether municipal or state, attempting to do this, would impair the obligation of the contract, and would be void under the constitution. The agreement was for a lease for twenty years. At the end of that time the possession of the works is to be surrendered by Stein to the city. Neither the agreement, nor the acts of the Legislature confirming it, contemplated the transfer of the franchise. The right to its exercise was conveyed. Nothing more. If this be so, then the city authorities assume the power to tax the mere possession of the right to exercise a franchise; the franchise still being in themselves.

The decision of the Supreme Court is based on the assump-

tion that the franchise itself was conveyed by the contract to Mr. Stein. In the case of Stein v. Mayor and Aldermen, 16 Ala. 241, Dargan, C. J., delivering the opinion of the court, says: "A privilege or franchise may not be liable to seizure and sale, but it is contended that the charter only authorizes the corporate authorities to tax real and personal property, and that this privilege is neither. In answer to this, we will only say, that it cannot be considered as a right of action merely, but it is property in possession, and being property (Quere—what sort of property?) it must be embraced within the one or the other of these terms; for we know of no species of property, that cannot be said to be either real or personal, whether it be corporeal or incorporeal." So that we are somewhat left in the dark as to what description of property, the interest of the plaintiff in error had in the water works. By referring, however, to the decision of this court in the case of Lewis v. Stein, 16 Ala. 217, we are told in the opinion of the same judge: "The plaintiff (in the court below), entered into a contract with the city authorities on the 26th December, 1840, by which he became the lessee of the water works for the term of twenty years. The contract was submitted to the Legislature of the State, and by the act of the 17th January, 1841, was ratified and confirmed, and all the rights, powers, privileges and immunities that had been granted to the Mobile Aqueduct Company and the City of Mobile, by the act of 1820, were granted to the plaintiff, to be by him enjoyed during the term of his lease. Under this contract and these several acts, it is clear, that the plaintiff is entitled to all the rights and benefits granted and conferred by act of 20th December, 1820, and is entitled to one half of any forfeiture incurred under the 4th section thereof, if such forfeiture be sued for by a common informer. He occupies the place and the stead of the city during his lease; he is possessed of all the rights that had been previously conferred on the city in reference to the water works; and if a forfeiture is recovered by a common informer, entitled to the half that previously belonged to the City of Mobile. This is the obvious construction of the acts of 17th January, 1841, and of the 4th of February, 1846." This court, then, has solemnly decided, that Stein is entitled to the benefit of the act of 1841, confirming his agreement with the corporate authorities, and vesting in

him "its right, powers, privileges and immunities; and that he occupies the place and the stead of the city during his lease." If so, what are we to understand by the term immunity? "Immunity.—Exemption from any charge, duty, office, tax or imposition; a particular privilege."—Webster's Dictionary, "Immunity." Then, by the plain letter of the agreement, the water works are exempted from the payment of a tax or imposition, in the same manner as when held by the corporate authorities themselves. If it does not mean this, it means nothing, and it is useless to attempt by words to define rights.

But it is denied that the interest of Mr. Stein in the water works makes them real estate, and the acts authorizing the tax applies to no other. The able and accomplished jurist who argued the case for the defendants in error, defined the right of Mr. Stein in the water works to be an "incorporeal hereditament," which is thus described by Blackstone: "An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exerciseable within the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like—but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels."—2 Blackstone's Com., p. 12 (side page 19). Chief Justice Dargan, in the case of Lewis v. Stein, says it is a lease for twenty years. "The plaintiff (below) entered into a contract with the city authorities, by which he became the lessee of the water works for the term of twenty years."—16 Ala. 217. If then the interest which Mr. Stein by his contract with the city authorities acquired in the water works, is not that of an "owner of real estate," no taxes can be imposed on them, while held by him under his contract.

The third and last proposition viz: "Whether, if taxes can be imposed on the water works, Mr. Stein is liable for the same," has been necessarily considered in the discussion of the second. Without repeating the views presented, the following conclusions seem legitimately to follow from them: 1st. That the right of taxation for the benefit of private corporations, whether for public or private purposes, is not vested by the constitution of Alabama in the Legislature; that any act attempting to impose or collect such tax is unconstitutional and void. 2nd.

That the Mobile and Ohio Railroad Company is a private corporation, and those sections of the acts of the Legislature herein before set out which authorize taxes to be collected from the owners of real estate in Mobile, are not authorized by the constitution, and are absolutely void. 3d. That conceding the constitutionality of the said acts of the Legislature, the interest of Mr. Stein in said water works, is not that of an "owner of real estate"; and said interest is not liable to taxation. 4th. That if said water works are liable to taxation, such taxation must follow the ownership—and that being in the corporate authorities of the City of Mobile must (if the anomaly can be reconciled of a city taxing its own property) be paid by said corporate authorities.

DANIEL CHANDLER and ROBERT H. SMITH, *contra*:

Under the agreed statement of facts, the first and most important question to be decided is, Whether the act of the Legislature passed in December, 1852, in reference to the tax on the real estate of Mobile, for the Mobile and Ohio Railroad Company, is constitutional and may be enforced? The right of taxation is an incident of sovereignty, and the sovereignty of a State extends to every thing which exists by its authority, or is introduced by its permission. Every thing, then, that may be considered as constituting a part of the property within the State, may, in the wisdom of the Legislature, be taxed. The limitation on the exercise of this right rests on the interest of the legislators, and the influence of the people on their representatives to guard them against its abuse. Private property may be taken for public use in two ways, viz., by taxation, and by right of eminent domain. Taxation exacts money from individuals as contributions to any public burthen. Private property, taken for the public use by right of eminent domain, is not considered as the owner's contribution to a public burthen, but as so much beyond his share, and for which special compensation must be made. Taxation operates upon the community, or upon a class of the community, as in this case; the exercise of the right of eminent domain operates upon an individual, without reference to any one else. In cases of taxation, the tax payer is always supposed to receive just

compensation in the protection which is extended to his life, liberty and property, and in the increased value of his possessions, arising from the use of the money raised by the tax. When money is thus raised and applied, no one can say that his "property has been taken and applied to public uses," and he has received no "just compensation" for it. His compensation is found in the sovereignty and laws of the State, which protect his personal rights and his private property; and it is felt in the increased value of his property by the application of the money thus raised. Had the property been taken, not by taxation, but by right of eminent domain, then special compensation must be made to the value of his property.

The right of the Legislature to delegate the power of taxation to the constituted authorities of a city for local purposes, is well established by legislative precedents and judicial decisions. It will not be denied in this case. By the city charter, the corporation has power to establish markets, to erect bridges, to establish fire companies, hospitals, workhouses, to open streets, to levy taxes on real and personal estate within the city, and to do all acts that a majority of the corporation may deem requisite and necessary for the good government of the city, not contrary to the laws of the State. The interests of the city require the exercise of these powers. But, while it is conceded that the Legislature may authorize the corporate authorities of the city to do these and similar acts, it is denied, that it can give the corporation power to tax the property of its citizens to construct a railroad, that will greatly promote the prosperity of the city. The object of the road is not so much to benefit the stockholders, as to advance the interest and prosperity of the city, by increasing its commerce, its population, the value of its real estate, and by giving facilities of access and transportation to and from the city. The railroad is more important to the interest and prosperity of the city, than the opening of new streets, erecting bridges, establishing markets, fire companies, &c., for which taxes are imposed and paid without complaint or objection. To bring water in the city, that increases the comfort of the citizens, is admitted by all to be the legitimate exercise of a corporate power; but to

bring trade to the city, that enhances its prosperity and wealth, is said to be unjust and unconstitutional. The Legislature did not think so, when they passed the act of 1852, The city authorities did not think so, when they sanctioned what the Legislature did, and immediately took the necessary steps to carry the act into effect. The legal voters of the city did not think so, when they consented that their property should be heavily taxed, in order that the road should be constructed.

In carrying into effect these acts of the Legislature, it must be borne in mind, that the rights of the defendant have not been violated or invaded. His property is taxed like that of other citizens, according to its valuation. The same men who assessed it, valued the property of all others.—There is no complaint of excessive taxation on his part—of injustice by a partial discrimination against his property: the only thing he complains of is, that his property is taxed without his consent. It is true, that the completion of the railroad will greatly enhance the value of his property, and as the population of the city increases, his income will be augmented; yet he wishes others to build the road for his benefit. His unwillingness to contribute to the completion of the road, has been shown in the only way in which it can be made available. He voted against the tax,—and there his opposition should end. Acquiescence in the decision of the majority, is now his duty. What right has he now to object, if the act of the Legislature has been sanctioned by the corporate authorities of the city, and been carried into effect by the voice of the people? It may be assumed, as a legal proposition well established, that the power of taxation may be delegated to the proper authorities of the city, and may be exercised and enforced against the will of minorities.

How is it to be ascertained whether any local measure will advance the interest and promote the prosperity of the city? is one man or the corporation to decide? is the minority or the majority to determine? are the courts or the Legislature to decide the question? It is the duty of the Legislature to decide whether any measure will advance the interests of the city. In this case, the right and power to

tax the property of the citizens of Mobile for a particular purpose, was left, with the sanction of the corporation, to the voters of Mobile. If the constitutional rights of the defendant have not been violated by the acts of the Legislature, or by the corporation in executing them, the opinions and wishes of the people must be carried into effect, against the objections and opposition of Mr. Stein. That the acts of the Legislature authorizing this tax are constitutional, and may be enforced, the following authorities show: Pamphlet Acts 1852, p. 328; Acts of 1850, p. 151; 24 Wend. 65; 9 B. Monroe 526; 17 Ala. 234; 9 *ib.* 234; 3 Gill 29; 4 Wheat. 428; 8 Leigh 120; 15 Conn. R. 475; 8 How. 82; 10 *ib.* 393; 4 Comstock 419; 9 Humph. 252; 11 Penn. R. 61; 3 Peters; 9 B. Monroe 330; 2 vol. No. 1, Livingston's Law Magazine, p. 28.

The second question presented for the decision of the court, under the agreed statement of facts, is this: Do the water works come within the provisions of the act of the Legislature, and are they taxable under it? The act of 1852 authorizes the corporate authorities to levy a tax on all real estate within the limits of the city, of two per cent. per annum for five years, &c. The only question is, whether or not the water works can be regarded as real estate? The agreed statement of facts on this point is as follows: "The water is brought into the city by means of cast iron pipes, of about eight inches bore, to a resorvoir within the city. By means of said iron pipes, which are buried about three or four feet under ground, the water is conducted into the city, and along the streets; and by means of small lead pipes the water is carried from the main pipes under ground, into the houses and lots of the citizens, who pay to Stein stipulated prices therefor annually. Under and by authority of the Legislature, &c., a tax of two per cent. has been levied on said water works, valuing the same at $75,000, making a tax of $1,500, which they claim, and are enforcing by proceedings directed by said act." Under this statement, the water, the reservoir, and the pipes constitute the water works, and they are considered in law real estate, and are therefore liable, under the act of 1852, to be taxed.—14 East Rep. 609; 10 Eng. Law & Eq. 374; 15 Adol. & Ellis, N. S., 377; 1 Barn. & Adolph. 113; 10 Adol. & Ellis, N. S., 218; 17 Ala.

240 § 2; 5 Barn. & C. 466; 5 B. & A. 156; 1 B. & C. 506; 3 Mason 464; 6 Greenl. 157; 20 Ohio 414; 17 Ala. 393; 2 Rh. Is. R. 15; 2 vol. No. 1. Liv. Monthly Mag., p. 30. The last of the above authorities considers the pipes laid in the streets of a city fixtures, and taxable as real estate without regard to ownership of soil.

If the water works are taxable under the act of 1852, the only other question, under the agreed case to be decided, is, whether Stein, the proprietor or lessee, is liable for said tax? Being the owner of the land, reservoirs, pipes and privileges attached to them, and being in the possession and enjoyment of the same, he is liable to pay the tax. If he is not, who is? The property is valuable; it has to be protected, and the defendant derives from its use large annual revenues. The city authorities have passed ordinances to protect his rights, and to enable him to enforce them. His property, under the influence of these ordinances and this protection, and the belief that this road will be completed, is advancing rapidly in value. No one but himself, so far as these water works are concerned, participates in their profits and in their increasing value. It is a sound maxim, that "he who receives the advantage ought to sustain the burden." In this case he receives all the advantage, and his share of the burden ought to be cheerfully borne. 14 East 609; 1 Maul. & Sel. 507; 8 Adol. & Ellis, 73; Cowper 619.

CHILTON, C. J.—Three questions are presented by the record for our consideration:

1st. Did Mr. Stein, by the contract of lease, and the act of confirmation passed by the Legislature on the 11th of January, 1841, secure an exemption from taxation upon his interest in the water works?

2nd. Are the acts constitutional under which the tax, now sought to be recovered, was levied? and if so,

3rd. Do the water works described in the record come within the act taxing the owners of *real* estate?

1. The first of these inquiries came substantially before us at a previous term, between these same parties, and we then held, "that the right to tax the property is not restricted nor impaired by the contract, and may lawfully be exercised." We have

reviewed the ground upon which that opinion rests, and are satisfied with it. Had the parties intended to secure so important an exemption to the appellant, it is highly improbable that they would have omitted to mention it in the contract; and as there is no provision contained in it, by which the right of the city to impose the tax is taken away, we cannot presume an abandonment of this right, and the yielding up of a power, on the part of the city, so essential to its corporate existence, as that of taxation for municipal purposes. We rest this first proposition upon the authority of the case above referred to (17 Ala. 234); and proceed to inquire:—

2. Whether the acts under which this tax was assessed, are constitutional. These acts may be thus stated:

The Legislature, having incorporated the Mobile and Ohio Railroad Company, by an act passed the 3rd of February, 1848, and having invested said company with the usual powers to carry into effect its objects, authorized them to locate, construct, and finally complete, a railway from some suitable point in the City of Mobile, in a western or north westernly direction, to the west line of this State, towards the mouth of the Ohio River, &c.—See act of 1847-8, p. 225. Subsequently, by an act to amend and explain the preceding one, passed the 5th of January, 1850, it was provided, "that for the purpose of facilitating the construction of the road, the mayor, aldermen and common council of the City of Mobile, be, and the same are hereby, authorized to levy a special and separate tax upon the real estate lying within the limits of said city, annually, until the sum of three hundred thousand dollars is levied and paid to the said Mobile and Ohio Railroad Company; *provided, however*, that only twenty-five cents, upon every hundred dollars' worth of property, shall be collected in any one year."

After making provision in the subsequent sections for assessing and collecting said taxes by the city authorities, and for the preservation of the names of the persons paying, with the amounts paid, and for issuing certificates of stock to any person who shall have paid one hundred dollars, &c., the seventh section provides, that before the said corporation shall be entitled to levy said tax, an election shall be held in said city, at which none shall be entitled to vote, except the owners of freehold estates in said city, or tenants under lease for a term of

five years and upwards, and guardians who represent estates of wards, and requires the concurrence of three-fifths of the votes taken, in favor of the tax as provided by this statute.—See Pamph. Acts of 1849–50, pp. 150–1–2.

By a subsequent act, approved the 20th of December, 1851, the third section of the act of 5th of January, 1850, is so far modified, as to abolish the right to levy $300,000 by taxation, and, in lieu thereof, the city is invested, under a like restriction of first procuring the concurrence of three-fifths of the owners, &c., of real estate in its favor, of levying a tax of two per cent. per annum, on all the real estate in the city, for five years; authorizing all persons who had previously subscribed for stock, and who had paid more than twenty per cent. thereon to said company, to deduct the over-plus so paid from the tax to be collected from them. This act contains other provisions, but they are not material in considering the question before us.

The required number of votes having been obtained in favor of the tax, the city was proceeding in its collection under the last named act, when the appellant, one of the tax payers who voted against the tax, and whose works for supplying the city with water had been assessed, raises the question as to the constitutional authority of the Legislature to invest the city with the power to levy it.

It is true, as stated by the appellant's counsel, that the constitution of the State does not mention the subject of taxation, except in the eighth section of the sixth article, which declares that "All lands liable to taxation in this State, shall be taxed in proportion to their value"; but the power to tax is an incident to sovereignty, and is said "to reside in government as a part of itself."—*Pr.* Marshall, C. J., in The Providence Bank v. Billings & Pittman, 4 Peters 415. In the formation of the State government, and the distribution of powers pertaining to it in its sovereign capacity, the *power to legislate* was conferred upon, and vested in, two distinct branches, the Senate and House of Representatives, together constituting the General Assembly of the State of Alabama. This department of the government, composed of the representatives of the people, elected by them to reflect their will, and to be influenced by their wishes, and amenable to them for an abuse of the trust reposed in them, does not depend for its power upon any specific provis-

ion of the constitution, pointing out the particular subject-matter with reference to which it may legislate. On the contrary, outside of those subjects which are excepted by the bill of rights, from the general powers of Government, the Legislature of the State, as respects all legitimate subjects-matter of legislation, is unrestricted, in virtue of its organization, except in so far as it is restrained by the State and Federal constitutions. The sovereignty of the State resides in the three departments upon which it has been conferred and distributed—the legislative, executive and judicial. To the first is entrusted the power of making new laws, to correct, repeal, or abrogate old ones; to the second, the execution of these laws; while to the third, it is reserved to make an application of them to particular facts, to determine differences which arise, to punish crimes, to try the validity of statutes by the standard of the constitution, and to protect each department of the government, and every individual in the community in the enjoyment of their chartered rights.—1 Kent 450.

Subject to the limitations above referred to, the power to levy taxes pertains to the legislative department of the government, which must determine the objects for which, and the manner in which, they must be levied, being responsible to their constituency for the proper exercise of that power.—8 How. 82.

We agree with the appellant's counsel, that the only legitimate object of taxation is, the support and maintenance of the government; but, if by this support and maintenance they mean the expenses incurred by the mere machinery necessarily employed in its administration and conduct, we are not agreed in so restricting its sense. We think the power extends to the employment of all those means and appliances ordinarily adopted, or which may be calculated, to develop the resources of the State, and add to the aggregate wealth and prosperity of the citizens; such, for example, as providing outlets for commerce; opening up channels of intercommunication between different parts of the State; improving the social, moral and physical condition of the people by wholesome police regulations, and by a judicious system of public instruction; as also for the protection, security and perpetuity of our government and institutions. We would not, however, attempt to point out all the objects, nor prescribe the limits to which the power of taxation

extends; the case before us does not demand this, but merely whether it is competent for the Legislature to delegate to the city authorities of Mobile the power to tax the owners of real estate, to aid in the construction of the Mobile & Ohio Railroad.

That the power to tax for *local* purposes may be thus delegated to municipal corporations, seems to be too well settled by the practice of our own and our sister States, and by numerous judicial decisions, to be considered an open question; nevertheless, its importance has induced us to examine it with care.—Perhaps there is not a county in the State, whose courts of roads and revenue have not, under the authority of legislative enactments, assessed and levied taxes for the erection of public buildings, bridges, and other public improvements within their respective limits. So, also, our statute books abound with enactments conferring upon civil corporations the right of taxation by means of by-laws; and this delegation of power has been several times, if not expressly, at least incidentally, sanctioned by this court.

In Battle v. The Corporation of Mobile, 9 Ala. 234, the question came up as to the validity of a tax assessed by the city under the act of the Legislature of 14th of January, 1844 (Acts p. 175); and Mr. Justice Goldthwaite, in delivering the opinion, says: "The general question as to the delegation of the taxing power to civil corporations, is not disputed, and, indeed, has been several times decided by us in other cases"; and he cites Intendant of Marion v. Chandler, 6 Ala. 899; Estrabrook v. The State, *ib.* 653. True, the precise point does not appear to have been discussed in either of these cases; but it underlies the decision in each of them. The several acts were regarded as valid, and must, therefore, have been esteemed constitutional.

In Talbot v. Dent, 9 B. Monroe 526, it was held, that an act authorizing the city of Louisville to subscribe for stock in a railroad company, and to pay for the same by taxation, the tax payers being entitled to certificates of stock, was not in violation of the constitution.

In the case of Nichol v. The Mayor of Nashville, 9 Hum. Rep. 252, an act of the Legislature of the State of Tennessee, which authorized the corporation of the City of Nashville to take stock in the Nashville & Chattanooga Railroad, and to

raise money by taxation to pay the subscription therefor, was held constitutional.—See also Hope v. Deaderick, 8 Hum. 1.

In The Commonwealth v. McWilliams, 11 Penn. Rep. (1 Jones) 61, a similar doctrine was sanctioned; and it was held, that an act, authorizing the supervisors of a township to subscribe for shares of the capital stock of a turnpike company, at the cost of the inhabitants of the township, was constitutional. The case of Parker v. The Commonwealth, 6 Barr 507, would seem to militate against the view here taken; but, as restricted in the cases of The Commonwealth v. The Judges, &c., of Lebanon County, 8 Barr 391, and The Commonwealth v. Painter, 10 Barr 214, it is not opposed to the validity of the tax now the subject of controversy. It is worthy of remark, too, that the Congressional precedent of submitting the question of the retrocession of the County of Alexandria in the District of Columbia, to the State of Virginia, to the qualified electors of that country, which is relied upon in the last decision above referred to, would seem to conflict with the views taken in the case of Parker v. The Commonwealth. In the one, the vote of the county determined whether they were to remain a part of the District of Columbia; in the other, whether they would have spirituous liquors retailed. Whether the latter can be regarded a violation of the constitution, is a question not now before us, and consequently we express no opinion on it.

The case of Goddin v. Crump, 8 Leigh 120, is in point. The City of Richmond was authorized by the Legislature of Virginia to borrow money to subscribe for stock in the James River & Kanawha Company, and to levy a tax to meet the payment. The question arose there, as it does in the case before us, whether the improvement of the James & Kanawha Rivers was to be regarded, with reference to that city, as a local purpose, by reason of the connection of those streams with its commerce and prosperty. It was held that it was, and the court sustain the law which authorized the tax.

So, also, in Maryland, in the case of Burgess v. Pue, 2 Gill's R. 19, the question came up, as to the right to recover a school tax, which had been voted by the taxable inhabitants of a school district. It was objected, that the act making provision for public institutions in primary schools throughout the State, was void, as being opposed to the constitution, by

reason of making its validity and operation in any county depend upon the votes of a majority of the voters of such county. The same arguments were urged in opposition to the law which are now insisted on; but the court held it no invasion of the constitution.

We have been favored with a paper containing the decision of the Supreme Court of Louisiana, in the case of The Police Jury, Right Bank of Parish of Orleans, v. The Succession of McDonough, decided in June, 1853, a case which, in all its leading features, is similar to the one before us, except, that there, a majority, instead of three-fifths, of the tax payers, could authorize the levying of the tax. The court, after a review of the principal authorities, sustain the tax. The reasoning of the court, in response to the objections to the law taken by the counsel, are so apposite to the case before us, that we deem it proper to quote a portion of the opinion. "It is said," says Slidell, C. J., delivering the opinion of the court, "that although the police jury might subscribe for stock for itself, it could not subscribe for stock for any one of the inhabitants in their individual capacity; that the intent and effect of the law is, to force individuals to take and pay for stock in a railroad, whether they wish it or not,—whether they think the enterprise likely to be beneficial or not; and that such a proceeding is mere spoilation for the benifit of a private corporation.

"This reasoning, and these assertions, misinterpret the purpose of the law, and involve a doctrine subversive of all taxation.

"The purpose of the law was, to enable political corporations to aid, by taxation, the completion of public improvements, which, it was supposed by the Legislature, would redound to their local advantage.

"The burden imposed was a tax, with regard to which each citizen has not a right to decide authoritatively for himself alone, whether the tax is for a useful purpose, and will redound to his individual advantage. If each citizen can be permitted to complain that his tax has been increased without his individual assent, and for a purpose which he individually disapproves, all government would be at an end.

"The will of a legal majority is not tyranny. It is the good

of the community to which we belong, which warrants a tax affecting our property. Of this public good, the Legislature, in taxation for general purposes, and the duly constituted local authorities, acting under the express will of the Legislature in a local sphere, and for local purposes, are the judges. The argument for the defendants confounds two distinct powers—the power of taxation, and the power of taking private property for public use. In the latter case, previous compensation must be made; in the former, though in taking a man's money for taxation you do take his property, the compensation is considered as simultaneously given, in the benefit which, as a citizen, he enjoys, in common with his fellow citizens, in the public welfare and the public prosperity, to the advancement of which the money is to be applied. Such is the theory of taxation. It may be abused, but its exercise cannot be judicially restrained, so long as it is referable to the taxing power;" citing Thomas v. Leland, 24 Wend. 69; 4 Peters 563.

In the case before us, the Legislature, doubtless, deemed that the benefits to accrue to the city would constitute a just compensation to those who contributed to build this road; but, as the tax payers themselves, who reside in the city, are presumed to be more familiar with the proposed enterprize, and better able to judge of its probable results, as respects their interests, as a matter of caution and security to them, and as a safe-guard to the minority, *three-fifths* of them are required to concur.

We do not consider this as a delegation of the power of legislation to the people; but it is a privilege conferred upon a municipal corporation, to be exercised conditionally—that is, in the event the requisite number of persons shall vote in favor of it. We see no difference, in principle, between allowing the corporation to levy the tax, provided three fifths of the taxable inhabitants shall vote in favor of it, and making the exercise of the power to depend upon any other feasible condition; such, for example, as requiring three-fifths of the aldermen and common council to concur in levying it. We do not think the cases of Thorne v. Cramer *et al.*, 15 Barb. Sup. Ct. R. 112, and Bradley v. Baxter, *ib.* 122, opposed to this view. In these cases, the question was not whether the Legislature possessed the power to invest a public corporation with authority to levy a

tax upon condition that a certain number of the subjects of the tax should assent to its being assessed, but whether it was competent for the Legislature to evade the responsibility of passing a law, by merely proposing it, and declaring that "the electors shall determine by ballot, at the annual election to be held in November next, whether this act shall or shall not become a law." This was a clear delegation of legislative power to the people, as respects a general law, and is, we think, clearly distinguishable from the delegation of authority to a corporation to do certain things upon the condition of first procuring the concurrence of the local inhabitants, whose interest alone is to be affected thereby. It will hardly be denied by any one, that the Legislature may constitutionally invest municipal corporations with the power of raising by taxation the means necessary for their existence and support by by-laws and ordinances operating upon the inhabitants within their respective local limits. If this power be denied, upon the idea that it is a delegation of the legislative functions, by parity of reasoning all authority to make by-laws and ordain police regulations must be denied, and thus no municipal corporation could exist for any beneficial purpose. Such, however, was not the design of the framers of the constitution. Such corporations, possessing similar powers, have existed from the earliest institution of political sovereignty, and have obtained in every civilized government. Indeed, history informs us, that they contributed largely in laying the foundation of liberty in modern nations.—Sir Jas. McIntosh's History of England, vol. 1, pp. 31, 32; Angell & Ames on Corp. 12.

Upon the whole, we see no objection, either as arising out of the constitution, or even as founded in public policy, to making the exercise of the power here conferred depend upon the expressed will of the taxable inhabitants. On the contrary, we esteem it a wise precaution, tending to enlist the vigilance of self interest as a protection against injustice and oppression.—The objection taken by the court, in the cases cited from 6 Barr and 15 Barb., that such enactments lacked the essential qualities of "command and prohibition," is, we think, plausible, but not solid. It is certainly not without the pale of State sovereignty to pass conditional laws, to grant franchises, or even to confer discretionary powers, with respect to which it would be absurd

to say they possessed the quality of either command or prohibition.

That the tax payers are made stockholders, is not a valid objection. They incur no additional liability, and their taxes are lessened in the proportion which the value of the stock bears to the amount which they pay. Nor is it a valid objection, that those who have paid over twenty per cent. may have the surplus deducted from the tax to be collected from them. The object was, as far as practicable, to equalize the burden, and to place those who had previously subscribed upon an equal footing with those whose taxes should secure them stock. The cases already referred to are sufficient to show, that the purpose for which this tax was authorized must be regarded, as respects Mobile, as local. That it extends beyond the city, and even without the limits of the State, is no objection to this view. The question is, has the city interest in its completion?—are the local interests of its inhabitants to be advanced, its real estate to be increased in value, its commerce augmented, its boundaries to be extended, its population increased, and its business generally to be enlarged, by the increased facilities of travel and intercommunication which the road will afford? The Legislature of the State, and a majority of three-fifths of its taxable inhabitants, have answered some or all of these question in the affirmative, by enacting and enforcing the tax; and it is not for the court to say that the decision which they have made is an unwise or impolitic one.

Tne removal of the bar in the James River above Warwick, although without the city of Richmond, was nevertheless a corporate act, as its effects would greatly redound to the interest of the city.—Goddin v. Crump, *supra*. The aqueduct which furnishes the water for the easement now taxed, has its commencement several miles out of the city; but will any one contend that its erection is not a corporate act? Certainly not. But it is useless to discuss the point further. Every one must concede the advantage which will result to a commercial city, from opening up a great thorough-fare for its commerce; and these advantages will, doubtless, more than compensate for the expenditure which the city will make towards the prosecution of the work. The certainty of the result, however, is a matter which the future alone can develop; the probabilities of its

successful issue can better be determined by those who have decided to bear the burden, in anticipation of the future benefits, than by this court. Thus much upon the constitutional question.

3. But it is argued, that Mr. Stein is not to be taxed for these water works, because they cannot be regarded as real estate. This proposition, like the one first noticed, is substantially covered by the previous decision of this court, in the case of Stein v. The Mayor &c. of Moble, 17 Ala. 234. If, however, the question was an open one, we should not hesitate to declare, that the easement should be classed as real estate.

The pipes are imbedded in the ground ; they lead from, and are connected with, the reservoir on the land of Stein. These pipes cannot be raised and severed from the land, without removing the soil; they are, therefore, clearly fixtures.—Gray on Fixtures 2; Gibbons' Law of Fixtures 15. That a portion of them run under the public streets by the license of the city, and that the reservoir is without the limits of Mobile, makes no difference. We must look to the nature of the works, and determine their character when viewed as a whole. The aqueducts, the reservoir, the land on which it is located, the pipes and appliances for conducting the water to the various houses, and its distribution, all connected, can with no propriety of speech be called personal estate ; but the materials, thus united, are fixtures, and the exclusive right to vend the water, as predicated upon this combination, is an easement or franchise, incorporeal, yet partaking of the nature of the subject-matter to which it is attached, and is therefore properly classed as real estate.

In The Providence Gas Company v. Thasher, 2 Rhode Isl. R. 15, it was held, that pipes laid in the streets of a city by a gas company, under a grant in their charter, are fixtures, and taxable as real estate. The court said, with respect to the right which the company took under their charter, "we think, when exercised, it is an easement ; an incorporeal hereditament, like the right of a railroad company to build and occupy their road, or a canal company their canal, under the provisions in their charter."

We are of opinion, that Mr. Stein, being the owner of this franchise for twenty years, and in perpetuity unless redeemed by the city after that period, and sole recipient of the profits aris-

ing from these works for the term mentioned in his lease, as confirmed by the act of the Legislature, should be held responsible for the taxes, having made no provision against his liability in his contract with the city, and securing no exemption in the law which confirms his lease.—13 Penn. R. 322; 11 Iredell 624. Whether he has not been over-assessed, is a question not brought before us, and one on which we express no opinion.

Without extending this opinion farther by a citation of the various authorities, most of which will be found on the briefs of the counsel, and which we have examined, we conclude that there is no error in the record, and the judgment is consequently affirmed.

WARE *vs.* CARTLEDGE.

1. In slander for words spoken which are actionable in themselves, it is not necessary to aver in the declaration the name of the person to whom, or in whose presence, they were spoken.
2. Evidence of the defendant's wealth is not admissible for the plaintiff in an action of slander.
3. Where the words spoken impute to plaintiff (an unmarried female) a want of chastity, evidence of other acts and words on the part of defendant, committed and spoken subsequent to the speaking of the words charged, but before the commencement of the suit, implying a want of chastity on the part of plaintiff, and indicating a desire to harrass, insult and degrade her, but not forming of themselves a separate cause of action, are admissible for plaintiff to show malice.
4. An infant cannot appoint an agent, nor make any binding contract in relation to the compromise of slanderous words spoken of him, if, on coming of full age, he think proper to disavow and annul it.

ERROR to the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

THIS was an action of slander for words spoken imputing to the plaintiff a want of chastity; she being an unmarried woman under the age of twenty-one years, and suing by her next friend.

There was a demurrer to the declaration, which was overruled. The several rulings of the court on the trial, to which exceptions were taken, are set out in the opinion.

RICE & MORGAN, for plaintiff in error:

1. The declaration is defective, because it contains no sufficient averment of the publication of the words. The discourse is limited to one ———, and there is no averment of the presence of others. "It is insufficient to aver that the words were spoken, without stating them to have been spoken in the presence of some one, or without some averment which necessarily implied a publication to a third person."—Starkie on Slander, p. 265 (360).

2. Evidence of the amount of defendant's wealth, was improperly admitted. The mere ownership of twenty thousand dollars worth of property, is not legal evidence of the owner's rank and influence in society. Greenleaf and Starkie agree, that the defendant's ability to pay is not a legitimate inquiry in an action of slander, and the courts of New Jersey agree with them; and this conclusion is fortified by the general principles regulating the assessment of damages.—Green. Ev. § 269; Starkie on Slander, p. 402; Coxe's (N. J.) R. 77, 80; Seay v. Greenwood, 21 Ala. 495; Jones v. Donnell, 13 *ib.* 490. Opposed to this array of principles and authorities, one or two States have, without reason, and contrary to principle, adopted a different rule. Case v. Marks, 20 Conn. 248, shakes the force of Bennett v. Hyde, 6 Conn. and in Morris v. Barker, 4 Harr. R. 520, it was expressly held, that the defendant's circumstances cannot be given in evidence in an action of slander. Again; if the plaintiff, in such an action, claims increased damages from the fact that defendant is wealthy, that fact ought to be averred in the declaration.—Donnell v. Jones, 13 Ala. 490; Seay v. Greenwood, 21 *ib.* 495.

3. When several pleas are filed, and issue is taken on each plea, if one of them is proved by the evidence, the defendant is entitled to a verdict on that plea. The court, therefore, erred in its charge.—Cullum v. Bank, 4 Ala. 39.

4. Each portion of the evidence objected to should have been excluded. The presumption of malice, sought to be drawn from such evidence, is strained and far-fetched.

L. E. Parsons and J. E. Belser, *contra :*

1. There was no error in allowing evidence of the value of defendant's property : it was one means of enabling the jury to judge of his rank and condition of life, and about the only one which can be fixed on with any certainty. It is expressly decided to be legal evidence, in numerous cases, and with a view to vindictive damages.—Adcock v. ———, 8 Iredell 365; Bennett v. Hyde, 6 Conn. 24 ; 20 *ib.* 250 ; 3 Pick. 376 ; 15 *ib.* 506 ; 3 Mass. 546 ; 7 Pick. 86 ; 2 Green. Ev. § 89.

2. To show actual malice, publication of the slander made more than six months before, and after the action was commenced, may be proved.—Morgan v. Livingston, 2 Rich. 573.

LIGON, J.—The demurrer to the declaration, and to each count of it, was correctly overruled. The only objection taken to it as a whole, or to any of its several counts, is, that in that portion of it in which the speaking and publishing of the slanderous words is averred, they are averred to have been spoken in the presence of a person whose name is left blank. The words spoken are actionable in themselves, and it is sufficient to aver that they were spoken and published of and concerning the plaintiff. This averment necessarily implies the presence of some one, to whom, or in whose presence, publicity was given to the charge. The name of such person, if set forth in the declaration, would not render it necessary for the plaintiff to prove that the words were spoken to him, or in his presence, before she would be entitled to recover ; but if the testimony showed that they were spoken to another and a different individual, it would suffice. The injury complained of is, not that the defamatory words were spoken to this or that individual, but that publicity had been maliciously given by the defendant to a false charge against the plaintiff.—Taylor v. How, Cro. Eliz. 861 ; Starkie on Slander, 460.

2. On the trial, the plaintiff was allowed to prove, that the defendant had in his possession property of the value of twenty thousand dollars. To the admission of this proof the defendant objected ; but his objection was overruled, and he excepted.

We suppose this proof was offered for the purpose of inducing the jury to imply that the defendant's wealth entitled him to a more exalted position in society than less wealthy persons

would occupy, and thereby rendered his slanders more withering and blasting in their consequences, than they would be if uttered by one whose estate was not so large.

We are aware that in many actions for *torts*, in which vindictive damages are allowed to be given by the jury, proof of the value of the defendant's estate has been allowed to go to the jury, both in England and the United States; but this rule is by no means universal. Conflicting authorities upon the subject are to be found both in English and American books.

In James v. Biddington, 6 Carr. & Payne 589 (25 Com. Law Rep. 553), which was an action for criminal conversation with the plaintiff's wife, Baron Alderson ruled out such proof, but admitted that, in some cases, it had been received; he thought, however, it should be confined to actions for the breach of promise of marriage. In Bennett v. Hyde, 6 Conn. 24, it was received for the purpose of increasing the damages, upon the ground that wealth gave increased importance to the words of the slanderer. While in Case v. Marks, 20 Conn. 248, the court, without expressly overruling Bennett v. Hyde, *supra*, doubts the propriety of the rule there laid down, and seriously questions the soundness of the reasoning on which it is founded. In Adcock v. Marsh, 8 Iredell (N. C.) Rep. 360, which was an action of slander, such proof was received, but solely upon the supposed existence of a general rule in England, which allowed it in all actions in which vindictive damages can be given.

The contrariety of decision as to its admissibility, disproves the existence of any such general rule, and leaves the question as yet an open one; it is certainly so in this court. We are inclined to believe, that this rule can only be applied universally in actions for breach of marriage promise. In these, the estate of the defendant may well be considered, as it tends to show what loss the plaintiff has sustained by the breach of promise complained of.—James v. Biddington, *supra*. This reason, however, does not apply to actions of slander, in which the falsehood of the words, and the malice with which they were spoken, form the gist of the action, and are generally the only points put in issue by the pleadings.

In Bennett v. Hyde, *supra*, C. J. Hosmer bases the admissibility of such proof upon the supposed existence of the fact, that "great wealth is generally attended with correspondent

influence; and little influence is the usual concomitant of little property."

It would seem, that, if such proof is allowable in order to aggravate the damages in such cases, when the defendant is wealthy, common justice would require, that a converse rule should prevail in the case of poor defendants, and they should be allowed to give their poverty in evidence to mitigate the damages. Yet nearly all the books declare, that this is not the case, and common sense revolts at the idea of its adoption. For sad would be the fate of that country, whose laws conceded to the insolvent bully, seducer, or slanderer, the privilege of perpetrating his wrongs with comparative impunity, under the assurance that, when sued for his practices, the damages would be graduated to his present ability to pay them, and consequently would be merely nominal. No sound principle of law tolerates such a practice.—Coxe's (N. J.) Rep. 77, 80; Morris v. Barker, 4 Harrington's (Del.) Rep. 520; Case v. Marks, *supra*.

That wealth often forms one element in fixing a man's position and elevation in society, may be conceded to be very generally true; but that this alone confers high rank, and gives extensive personal and social influence, is disproved by our daily observation. Its possessors are often found among the most despised, and least influential among us. While, on the other hand, rank, influence, and power, are all combined in persons of very inconsiderable estate.

When this proof is admitted, it is upon the presumption, that wealth gives influence. Thus, the plaintiff is allowed to prove the wealth, that the jury may infer the influence; a conclusion, in many cases, by no means legitimate. If the plaintiff is allowed to prove the neighborhood estimate of the defendant's estate, or the quantity, kind and value of his property, to show his wealth, should not the latter be allowed to show, that he is largely indebted, and that if his debts were paid he would be poor? Again; should he not be allowed to show also that, although his estate was large, his influence was small? We mention these considerations, for the purpose, not only of showing the unsoundness of the rule under which the court below received this proof, but also to show how inconvenient such a rule would be in practice, if the principle upon which it rests should be extended to other matters, to which, in common justice,

they should be extended, and to which they are equally applicable. Numberless collateral issues would necessarily arise, to withdraw the attention of the jury from the main one, and, in many cases, lead to injustice. For these reasons, we esteem it unsafe, and cannot adopt it.

The wealth or poverty of the defendant has nothing to do with his guilt or innocence of the slander, nor does it tend to show malice, or the want of it, in uttering the words complained of; it is, therefore, wholly irrelevant. For these reasons we are of opinion that the court erred in permitting the testimony to go to the jury.—2 Greenleaf's Ev. 221, 222, § 269.

3. On the trial, after proving the utterance and publication of the slander as it is laid in the declaration, the plaintiff offered to prove, in order to show express malice in the defendant, that after the words complained of had been spoken, and before the suit was brought, he did, on two occasions, in presence of other persons, so act and speak to her, as to imply that she was unchaste, and a common strumpet; neither the words used on such occasions, nor the act done, forming, of themselves, a separate cause of action, but indicating a desire to harrass, insult, and oppress the plaintiff's feelings, and to degrade her in society. The court allowed the conduct and words of the defendant in this respect to go to the jury; to which the defendant excepted. The acts and words thus proved are much too gross and brutal to find a record in this opinion, and could only arise from a malice which would be satisfied with nothing short of the utter degradation of its victim. It is deeply to be deplored that this purpose, so apparent, had not been seen by the counsel for the defendant, at the time of the trial below, and thus the records of this court might have been freed from the foul and vulgar blot which their recital in the bill of exceptions has indelibly placed upon them. It is painful and offensive to read the recital, and leads us to the conclusion, that the defendant is capable of descending to any depths of moral degradation, if by that means his malice against the plaintiff could be gratified, and she become degraded in the estimation of those who were the witnesses of his words and conduct. The court below did not err in allowing either portion of this proof to go to the jury, for the purpose of showing express malice on the part of the defendant.—3 Pick. 376; 2 Richardson 573.

4. It appears that the plaintiff is an unmarried woman, under the age of twenty-one years, and has no guardian. On the trial, the defendant, among other things, pleaded accord and satisfaction; and under this plea, he offered to prove the payment to the brother-in-law of the plaintiff, of the sum of $50 00, as an agreed compensation for injury complained of. He also offered some proof tending to show that the brother-in-law was authorized by the plaintiff to make this compromise, and accept this satisfaction. The proof on this subject was contradictory, and the brother-in-law deposed that he had no authority from the plaintiff to make the compromise. The court charged the jury, on this part of the case, "that if they believed the plaintiff to be under twenty-one years of age, at the time the compromise was made and the satisfaction received by Harris (her brother-in-law), and at the commencement of this suit, they could not find for the defendant on the issue of accord and satisfaction." To this charge the defendant excepted.

The charge is correct. An infant cannot appoint an agent, nor make a contract binding on himself, in relation to matters like those here involved, if, on coming of full age, he think proper to disavow and annul it. Had the proof on this part of the case been clear as to the plaintiff's assent to the compromise, still the charge is correct, as such an agreement would not bind her.

For the error heretofore noted, the judgment of the court below is reversed, and the cause remanded.

R. W. SMITH & CO. v. MALLORY'S EX'R.

1. Partnership creditors are not entitled to share *pari passu* with the separate creditors in the estate of a deceased partner, when it is insufficient to pay its separate debts, and the surviving copartner, though insolvent, has a joint fund in his hands.
2. The object of the act of 1839 (Clay's Digest 324 § 67), was not to affect in any way the rights which a separate creditor had against the estate of the

deceased partner, but simply to allow the partnership creditor to assert his claim against such estate in a court of law, instead of resorting to a court of equity.

3. The act of 1843 was intended to make all the debts equal in degree—to place simple contract debts on the same footing with debts by judgment and specialty; but it was not intended to fasten upon the estate, to the prejudice of separate creditors who had a superior equitable and legal right, claims which, without reference to the statute, could not have been asserted against the estate, either at law or in equity.

APPEAL from the Court of Probate of Mobile.

THE estate of George M. Mallory having been declared insolvent, the appellants, Robert W. Smith & Co., filed as a claim against his estate certain notes which they held against the firm of George M. Mallory & Co., which was composed of said Mallory and one John Meldrum. On the trial of the case, it was admitted that these notes were executed by said firm, during the lifetime of said Mallory, in the usual course of their business; that the appellants had brought suit on them, after the death of Mallory, against said Meldrum, the surviving partner, and had obtained a judgment against him for the amount due; and that an execution had been issued on this judgment, and returned "no property found."

In support of their claim, the appellants offered the deposition of said John Meldrum, who testified, that he became a member of the firm of George M. Mallory & Co. in March, 1851; that said firm was engaged in the commission business, and also bought bagging and rope; that the partnership continued until the death of Mallory, which occurred on the first of January, 1852; that said Mallory was considerably indebted at the time of the formation of said partnership; that his capital principally consisted of a plantation and negroes in Greene County, Alabama; that Mallory stated to him that he intended to sell said plantation and negroes at an early day, convert them into money, and bring it into his business; that there was but little cash in the concern, and this statement of Mallory was the inducement for witness' forming said partnership, and otherwise he would not have entered into it; that he was Mallory's book-keeper at the time of the formation of said partnership, and the

same set of books was continued after its formation; that there was, when witness took charge of Mallory's books, an account with Mallory's said plantation, by which the plantation was indebted to said Mallory in a large amount; that this account was continued up to the time of the formation of the partnership, when the plantation was still largely in debt; that the same account was then continued with George M. Mallory & Co., and at the time of the dissolution of said firm there was a balance against said plantation of about $6,000 or $7,000; that said firm was insolvent at the time of dissolution, and witness was then, and has continued, and is now, unable to pay the debts of said firm; that after Mallory's death witness paid some confidential debts of the firm, amounting in all to several thousand dollars, with the assets of the firm, and a large amount of these confidential debts is still due; that the assets realized by the firm, after Mallory's death, without considering the debts due by the firm, were some $10,000 or $15,000, a part of which was employed in paying off confidential debts, as aforesaid.

Said Meldrum further testified, on cross examination, that he has no individual claim against said Mallory's estate, and will be benefited only so far as the partnership debts may be paid by his estate, and witness thus exonerated; that he wound up the business of the firm after its dissolution, and received and sold cotton for its customers, which had been promised to the firm before Mallory's death, on some of which the firm had made advances or acceptances; that he has received commissions on this cotton, for which he has never accounted with the executor, and has never had any settlement with him.

On this proof, the appellants moved the court to allow their claim against said Mallory's estate, and to order it to be paid equally and rateably with the other separate and partnership creditors; which motion the court refused to grant, and decided that all the individual creditors of the estate should be paid in full before the partnership creditors could receive anything. The appellants excepted to this ruling of the court, and they now assign it for error.

William G. Jones, for the appellant:

1. This case, it is submitted, is fully covered and settled,

in favor of the appellants by the decision of this court in the case of Emanuel v. Bird, 19 Ala. 596. In that case there was a partnership fund ; so what is said about there not being any partnership fund, is merely an *obiter dictum.*

2. It is supposed that this case can be distinguished from that, on the alleged ground, that in that case there was no partnership fund, whilst in this there was at one time some partnership fund, to which the partnership creditors might resort. But under the proof in this case, there was no ground, in fact, for such distinction. The plaintiffs, in their affidavit, made on filing their claim, expressly state that Meldrum, the surviving partner, is insolvent; thus showing their right to proceed against the executor of the deceased partner, under the provisions of the statute in Clay's Digest 324 § 67. The allegation of Meldrum's insolvency is not denied by the executor ; neither does the executor, by his objection filed to the claim, pretend or allege that there was any partnership property or effects to which the plaintiffs could resort. The objection does not present any legal valid defence against the claim. But the plaintiffs, in fact, proceeded against the surviving partner, and obtained judgment against him, on which execution was returned "*nulla bona*';' thus proving, legally, the insolvency of the firm and the surviving partner, and bringing themselves fully within the statute above referred to. Besides this proof, Meldrum himself was examined as a witness, and proved positively the insolvency of the firm and his own insolvency.

3. The statutes of Alabama (Clay's Dig. 323 § 63 ; *ib.* 324 § 67 ; *ib.* 192 § 2) have materially changed the common law, as to the liability of the estate of deceased partners for partnership debts. Previous to the passage of these statutes, a partnership debt was considered, at law, as only joint, and not joint and several. As a consequence of this, a partnership creditor could not sue one of the partners : he was obliged to sue all. If one died, the creditor could only sue the survivor, and had no right of action against the representatives of the deceased partner, at law. This is all changed by these statutes. Now the debt is expressly made joint and several ; either one or more of the partners may be sued, if all are living ; and if one die, his executor or ad-

ministrator may be sued at law, on affidavit of the insolvency of the survivor being filed, as was done in this case, or even without such affidavit.—Clay's Dig. 324 § 67. Our laws in relation to insolvent estates provide for the payment of all debts of the decedent equally, and *pari passu*. A debt against a partnership, having been made joint and several, is as much a debt against the decedent as any other note made by him and another would be. It is embraced in these laws.—19 Ala., *supra*.

4. This construction has been put upon similar statutes of other States.—Spring's case, 1 Ashm. 347 ; 5 S. & R. 78; 6 Ohio Rep. 103 ; 7 S. & M. 28 ; 3 Martin, N. S., 599 ; La. Cond. Law Rep. 631 ; Martin & Yerger 399 ; 1 American Leading Cases 326; 10 Met.; 5 Cranch; 2 R. & M. 494.

5. It will be observed, that the only objection made by the executor to the claim, was, that it was a partnership debt, without alleging that there was any partnership fund or any solvent surviving partner. It was, therefore, no answer to the claim ; at all events, the burthen to prove that there was a partnership fund or a solvent surviving partner, was on them.

6. Though there may have been some funds of the firm at the death of Mallory, yet there were none at the time of settlement ; and that is the time to which the court should look.

7. It is contended, that under our statutes, the partnership creditors have a right to proceed against the representatives of the deceased partner, no matter what may be the condition of the firm, or the surviving partner, as to solvency.

8. The proof makes out a *prima facie* legal claim, and the *onus probandi* was on the executor, to show facts sufficient to discharge the estate. This proof he has not made.

A. F. Hopkins, *contra* :

The general rule which regulates the right to priority of payment, as between the partnership creditors and the separate creditors of the deceased partner, is the same in equity as in bankruptcy. The rule secures to joint creditors the right of priority of payment out of the joint estate, and to separate creditors a like priority of payment out of the separate estate

of the deceased partner.—Story on Partnership, § § 363, 376, 380; Coll. Part. 775, § 920; 19 Ala. 602. The only one of three exceptions to this general rule, which it is now necessary to notice, is, that if there had been no partnership effects at the death of Mallory, the surviving partner being insolvent, the joint creditors would be entitled to share with Mallory's separate creditors in his individual estate.—Story's Part. § 378.—While it is admitted that the surviving partner is insolvent, he proves that the assets of the firm, at Mallory's death, were from $10,000 to $15,000, and that with these he has paid partnership debts to the amount of $5,000 or $6,000.

A joint estate, however small, secures to the separate creditors the right to priority of payment out of the separate estate of the deceased partner.—Story on Partnership, § 380; Coll. Part. § 926. A partnership fund to the amount of five pounds has been decided to be a complete bar to an application for payment by the partnership creditors out of the separate estate of the deceased partner, even though such joint fund had been created by the separate creditor's purchasing some of the partnership assets, actually worthless, only for the purpose of creating such joint fund.—Coll. Part. § 926, p. 779. The foregoing principles of law are recognized by the Supreme Court of Alabama, in the case of Emanuel v. Bird, 19 Ala. 603, where the joint creditors were allowed to share with the separate creditors in the individual estate of the deceased partner, on the express ground that there was no partnership fund at the death of the partner, and that the surviving partners were insolvent.—19 Ala. 603; 1 Hare & Wallace, pp. 312 to 324. Several of the joint creditors, and among them R. W. Smith & Co., have received part payment of their debts out of the partnership fund, and yet they now claim to share equally with the separate creditors in the separate estate of Mallory.

This is a judicial proceeding, and accomplishes the object of a suit. The principle is well settled, that if a joint creditor sue out a joint *fiat*, he thereby binds himself to resort to the joint property only; and the rule is the same, where a *fiat* is issued, on the application of a joint creditor, against the surviving partner. Smith, therefore, by suing and recovering a judgment against the surviving partner, barred any claim, under any circumstances, which he might have had against the sepa-

rate estate of Mallory.—Coll. Part. § 925; Story's Part § 379. It has been determined in Maryland, that partnership creditors must be postponed in the distribution of the separate estate of a deceased partner, to his individual creditors, whether there is partnership property or not.—1 Har. & G. 96, 107; 1 Hare & W. 310, 318; 5 Metcalf's R. 575.

In the case of Emanuel v. Bird, 19 Ala. R. 603, this court recognized the power of the Probate Court to act upon the rule which obtains in courts of equity and in bankruptcy, for regulating the priority of payment among these two classes of creditors; and it necessarily has the power to decide between their conflicting claims. The record shows, too, that Mallory's individual estate is not sufficient to pay his individual creditors in full.

GOLDTHWAITE, J.—The evidence clearly shows, that the estate of the surviving copartner, Meldrum, was insolvent; but it also, as we think, shows a joint fund in his hands, and as the estate of the deceased copartner is insufficient to pay its separate debts, the sole question is, whether under these circumstances, the partnership creditors are entitled to share *part passu* with the separate creditors, in the estate of the deceased partner.

That the joint creditors have a primary claim upon the joint fund, to the exclusion of the separate creditors, in the administration and distribution of the estates of bankrupt or insolvent partners, is too well settled, at this day, to require the citation of authority; and this right, on the part of the joint creditors, was made the basis of the equity of the separate creditors to a primary claim upon the separate property of bankrupt partners, by the English Chancellors before Lord Thurlow.—*Ex parte* Crowder, 3 Vern. 706; Twiss v. Massey, 1 Atk. 67; *Ex parte* Hunter, *ib.* 227; *Ex parte* Cook, 2 Pr. Will. 500. Chancellor Thurlow, however, thought that the "justice of the case would be, that both the joint and the separate creditors should come in *pari passu*, upon both funds" (*Ex parte* Cobham, 1 Bro. 576; *Ex parte* Hodgson, 2 Bro. 5; *Ex parte* Page, *ib.* 119; *Ex parte* Flintum, *ib.* 120); and the distinction which previously existed, between joint and separate creditors, in the

distribution of the assets of a bankrupt partner, was done away during his administration. The successor of Thurlow, Lord Loughborough, in *Ex parte* Elton, 3 Ves. 238, restored the rule which had previously obtained; defending it on general principles of equity, and declaring "that it had long been settled, and it was not possible to alter that, that each estate was to pay its own creditors." Since then, although Lord Eldon is not fully satisfied with the rule, he concedes it upon the principle of *stare decisis* (*Ex parte* Kensington, 14 Ves. 448; Dutton v. Dutton, 17 *ib.* 207); and the question is now regarded as a settled one in the English courts.—Story on Partnership § § 376, 377, and cases there cited.

In the American courts, the decisions are contradictory. The question has been ably discussed, and the correctness of the rule denied, in Pennsylvania, Connecticut, Ohio and Tennessee (The Estate of Spivey, 1 Ashm. 347; Camp v. Grant, 21 Conn. 53; Grosvernor v. Austin, 6 Ohio 103; Bell v. Newman, 5 S. & R. 78); but it has received the judicial sanction of the Supreme Court of the United States, in Murrell v. Mill, 8 How. 414, and has been recognized as the law in the courts of New York, Maryland, New Jersey and South Carolina.—Wilder v. Keeler, 3 Paige 168; Egbert v. Wood, *ib.* 518; Payne v. Matthews, 6 *ib.* 20; Murray v. Murray, 5 Johns. Ch. 60, 72; Jackson v. Cornell, 1 Sand. Ch. 343; McCulloch v. Dashiel, 1 Harr. & Gill. 96; Camak v. Johnson, 1 Green's (N. J.) Ch. R. 163; Tunn v. Trezevant, 2 Dess. 264; Waddrup v. Price, 3 *ib.* 203; Hall v. Hall, 2 McCord Ch. 269; and see, also, Arnold v. Hamer, Frem. Ch. 509, and Oakley v. Rabb, *ib.* 546. Judge Story, while he considers the foundation on which the rule rests, as "questionable and unsatisfactory, admits it to be firmly established,"—Story on Part. § § 377, 382. Chancellor Kent declares in its favor, both upon principle and authority; and it may be added, as an argument in favor of the equity of the rule, that it is found in both the Roman and French law. Dig. Lib. 14, tit. 4, c. 5; Pothier Pand., Lib. 14, tit. 4, n. 8; Durenton, Cours de Droit Franc, Tome 17, § 467, p. 512, 513, 514. While it may be conceded, that the rule is not free from objection, it is doubtful whether any other

would meet out equal justice; and we deem it better, in such cases, to decide with the weight of authority, which is clearly in support of the rule as established in England.

We have said nothing as to the case of Emanuel v. Bird, 19 Ala. 596, for the reason, that the ground on which that decision rests, is, that there was no joint fund, and no solvent partner; which made it an exception to the general rule.—*Ex parte* Hall, 9 Ves. 349; *Ex parte* Ackerman, 14 *ib.* 604; *Ex parte* De Tastet, 1 Rose. 10; *Ex parte* Buckle, 1 Glyn. & Jam. 34; McCulloch v. Dashiel, *supra*; Story's Part. § 378.

But it is urged, on the part of the appellants, that the rule we have considered is changed by the operation of our statutes. The act of 1818 (Clay's Digest 323 § 63) does not change the obligations of partners from joint to joint and several.—Marrs v. Southwick, 2 Port. 370; Van Pheel v. Connolly, 9 Port. 452; Trann v. Gorman, *ib.* 456; and in relation to the act of 1839 (Clay's Digest 324 § 67), it is to be remarked, that before its passage, a creditor of the firm could not sue the estate of a deceased copartner at law.—Coll. on Part. §576. At law, the debts of partners were joint; and by the death of one, they were extinguished as to his representative, except in equity.—Marrs v. Southwick, *supra*. In that court, he could proceed at once against the representative of the deceased copartner, without reference to the question whether the joint estate was solvent or insolvent, or to the state of accounts between the partners.—Devaynes v. Noble, 1 Mer. 529; S. C. 1 Russ. & M. 495; Wilkinson v. Henderson, 1 M. & K. 532; Thorpe v. Jackson, 2 Y. & C. 553; Coll. Part. § 581. But when the creditor has obtained a decree for the payment of his debt out of the estate of the deceased partner, under the equity of the principle we have already determined, he will still be postponed to the separate creditor, unless there is no joint estate.—Gray v. Chiswell, 9 Ves. 118: Story on Part. § 363, and cases there cited. By the statute referred to, however, the rule was partially changed, and the creditor of the firm allowed to assert his claim, at law, against the representative of the deceased partner, upon making affidavit that the surviving corpartner was insolvent, or even without such affidavit; but in the last case, he was not permitted to sue out execution, until a return of *nulla bona* against the surviving corpartner. The object of the

statute was, not to affect in any way the priority of right which the separate creditor had against the estate of the deceased copartner, but simply to allow the creditor of the firm to assert his claim against such estate in a court of law, instead of a court of chancery. If the estate of the deceased partner was solvent, he obtained his debt by a more simple process; but if insolvent, the creditors who had a superior claim preserved their advantage.

Neither, in our opinion, is the law changed by the act of 1843 (Clay's Digest 192 § 2) providing for the distribution of the assets of insolvent estates, amongst all the creditors *pro rata*. As we have seen, the claim of the joint creditors was, at law, extinguished against the representative of the deceased copartner; and neither in law, under the act of 1839, nor in equity, if there was a joint fund, could he obtain payment, except out of the surplus of the separate estate left after the payment of the separate creditors. There being a joint fund, he was not a creditor, unless there was a surplus of the separate fund. In other words, he had no right, either at law or equity, to charge any portion of the separate estate of the deceased partner, except the fund remaining after the discharge of the separate debts. The act of 1843 was intended to make all the debts equal in degree,—to place simple contract debts on the same footing with debts by judgment and specialty; but it was not intended by that act to fasten upon the estate, to the prejudice of creditors who had a superior equitable and legal right, claims which, without reference to the statute, could not have been asserted against the estate either in law or equity.

Judgment affirmed.

Ex parte EDWARD HENRY.

1. The statute authorizing the summoning of a jury to try any question of fact touching the validity of a will (Clay's Digest, 304, § 35), vests in the court trying the issue a more enlarged discretion than is ordinarily exercised by courts in trying issues in civil causes.
2. The statute requiring the subscribing witnesses to a will to sign it in the presence of the testator, applies only to devises, and has no application to bequests; and therefore a will containing an attestation clause, but not attested, though void as to the realty, may be good as to the personalty, if it was really intended by the testator to operate as his will irrespective of the attestation.
3. Where a will of real and personal property, though containing an attestation clause, is not attested, the presumption is, that it is incomplete and is not the will of the testator; but this presumption is slight, and may be rebutted by slight circumstances; as if the testator was prevented from finishing it by the act of God, or if he intended it to operate in its present form.
4. The validity of a will of realty and personalty was contested on three grounds, viz., because it was not signed by the subscribing witnesses in the presence of the testator; because the testator, at the time of its execution, was of unsound mind and memory; and because it was procured by fraud and undue influence on the part of the testator's wife; the jury having returned a verdict finding it invalid generally, the court, on motion of the contestant, inquired on what ground their verdict was predicated, to which one of their number replied, "principally on the ground that it was not signed by the witnesses in the presence of the testator;" and the court then ordered them to retire and find another verdict: *Held*, that the contestant could not have a *mandamus* for judgment on this first verdict.
5. Where a verdict, finding the will invalid, is rejected by the court on the motion of the contestant himself, he cannot afterwards have a *mandamus* for judgment on it.
6. Where the jury return a general verdict finding the will invalid, but state to the court that their verdict is not predicated on any one of the grounds of contest, and that they cannot agree upon any one of them, their verdict may be rejected.

Application for mandamus to the Circuit Court of Coosa, in the matter of a contested will; the Hon. Thos. A. Walker presiding in the court below, to which the cause had been removed from the Court of Probate of Talladega. The application is based on the following facts, as appears from the bill of exceptions contained in the transcript which is submitted as a part of the application:

William McPherson propounded for probate a paper purporting to be the last will and testament of Edward Henry, deceased, which was contested by Edward Henry, the petitioner. The counsel for the parties agreed, in open court, that the proponent should be regarded as tendering, in legal form, this issue: "that the paper propounded for probate is the last will and testament of said Edward Henry, deceased, and that the same is valid as such last will and testament;" and that the contestant should be permitted to offer evidence to the three following points, as though they had been legally presented in proper form, viz., that said paper is invalid as the last will and testament of said Edward Henry, deceased, 1st, because the same was not signed by the subscribing witnesses in the presence of the testator; 2nd, because, at the time of making said last will and testament, said Edward Henry was of unsound mind and memory; and, 3rd, because said paper was obtained by fraud and undue influence on the part of the testator's wife. It was further agreed, that the contestant might present each and all of these points in the charge of the court to the jury, and that each party should have the right to except.

After the evidence had all been submitted, and the cause had been argued by the counsel, the court proceeded to charge the jury on the rules of law applicable to the case, and instructed them, "if they found the will valid, to say, 'We, the jury, find this paper valid as the last will and testament of Edward Henry;' but if they found against its validity, they should say, 'We, the jury, find this paper invalid as the last will and testament of Edward Henry,' and should state the ground on which they found it invalid, because of the first, second or third ground of contest, or for all of them, or any two of them, and which." The jury then retired, and returned the following verdict: "We, the jury, find the paper invalid as the last will and testament of Edward Henry, deceased." Thereupon, the counsel for the contestant requested the court to inquire of them upon what ground they found their verdict; which the court did, and one of them answered, "Principally on the ground that the will was not signed by the witnesses in the presence of the testator." The counsel for the proponent then insisted, that the jury should retire and designate on what ground they based their verdict; but the counsel for the contestant asked

leave to withdraw their inquiry, and objected to the jury again retiring, and insisted that the verdict should be received. The court instructed the jury, to retire again and pass upon all the issues, and to state in their verdict upon which ground they found the will invalid; and to this the contestant excepted.

The jury returned again, with the following verdict: "We, the jury, find the paper invalid as the last will and testament of Edward Henry, because the same was not signed by the witnesses in the presence of the testator." On motion of the contestant, the court inquired of them, whether they had passed upon the other issues, as to the unsoundness of mind and undue influence; and the jury replied, through their foreman, that they had not. At the instance of the contestant, the court instructed them to retire again, and to pass upon the other issues if they could; to this proponent objected, and insisted that the last verdict should be received, but his objection was overruled, and the jury retired again.

A third verdict was returned, which was in these words: "We, the jury, find the paper invalid as the last will and testament of Edward Henry, deceased." On the motion of the proponent, the court again inquired, whether this verdict was found on all the issues, and whether they had passed on all the issues; to which the foreman replied, that they had not, and further stated that they could not agree upon any one of the issues. The court again ordered them to retire and try to agree upon a verdict; the contestant insisting upon the first and last verdict, and the proponent insisting on the second.—The jury, not being able to agree upon a verdict, were finally discharged, and a mis-trial was entered; and the contestant now asks for a *mandamus* to compel the rendition of a judgment on one or all of these verdicts.

An opinion was delivered, refusing the motion, at the last term of the court; but on the petitioner's application for a rehearing, it was withdrawn.

Belser & Rice, for the motion:

1. The law confers upon the jury the right to find a general verdict, or a special verdict, as the jury may elect; and although the court may instruct the jury to find a special verdict, yet if a general verdict is rendered, it is valid and lawful.—3 Bouv.

Inst. 496; The State v. Jones, 5 Ala. 666; 30 E. C. L. R. 135; People v. Croswell, 3 Johns. Cases 367, 376; 3 Ad. & El. 506; 10 Metcalf 282; 3 Murph. 571; 9 Mass. 388; 5 *ib.* 436.

2. Verdicts are to be favorably construed; and if the courts can collect the clear meaning of the jury from the verdict, they will work it into form. If the verdict find the whole that is in issue, and something more, the verdict is good. If a jury state the evidence on which they find the verdict, it is surplusage, and will not vitiate the verdict. The reasons of finding a verdict are not to be received, or considered as part thereof.—Tippin v. Petty, 7 Porter 441; Rockfeller v. Donnelly, 8 Cowen 652; 3 Term R. 659; 12 Pick. 15; 30 Maine 337; 8 Pick. 170.

3. Every verdict is general or special. A general verdict is one where the whole matter in issue is found; e. g., guilty or not guilty—assumpsit or non-assumpsit—the will or not the will. A special verdict is where the jury find the naked facts as proved, submitting a question of law flowing therefrom to the court, praying their advice, and concluding conditionally, that if the court are of opinion that the plaintiff had cause of action, they find for him; otherwise for the defendant.—3 Bouvier's Institutes, 496, *et seq.*

4. Not one of the verdicts found in this case, can be regarded as a special verdict. 1st. The matter in issue, to-wit: whether the paper propounded for probate is valid or invalid, as the last will and testament of Edward Henry, is not found specially; 2d, the jury do not find matter of fact only; 3d, the jury do not submit to the court any question of law flowing from the facts; 4th, they find generally, that the paper is invalid, as the last will and testament of Edward Henry.

5. A verdict on only one of several issues is good, if its finding comprises the merits of the several issues.—Rockfeller v. Donnelly, 8 Cowen's R. 651, 652; Petrie v. Hannay, 3 Term Rep. 659.

6. Where there are several issues, and the finding of one is decisive of the cause, the jury may be discharged from finding upon the other issues, whether the parties consent or not.—French v. Hanchett, 12 Pick. Rep. 15, and cases therein cited.

7. Where a jury render a verdict which substantially decides

the whole matter in issue, the court may put it in form, or may send the jury out to put it in form; but neither the court nor jury can disregard such verdict. And if a second verdict is rendered by the same jury, differing in substance from the first, the second is void, and the first shall be good.—Winslow v. Draper, 8 Pick. Rep. 170; Snell v. Bangor Navigation Co., 30 Maine R. 337.

8. Whatever may be the form of the issue, its substance, in every such case as this, is, whether the contested paper is valid or invalid as the last will and testament of the deceased; and the party claiming the contested paper to be the will, holds the affirmative, and should be required first to prove every controverted fact necessary to the probate of it.—Clay's Dig. 304 § 35; *ib.* 363 § 6; Rogers v. Thomas, 1 B. Mon. 390.

9. Whether a will of personal property only may not be valid without any subscribing witnesses, is not a material question in this case; for conceding it may, yet this is one of the cases "in which something more than a mere compliance with legal requirements was made necessary to the efficacy of the will, by the testator himself, he having chosen to prescribe to himself a special mode of execution." In such case, the law is, if the testator afterwards neglects to comply with the prescribed formalities, the inference is, that he had not fully and definitely resolved on adopting the paper as his will.—1 Jarman on Wills, marginal pages 93 to 97; 4 Mass. 460; Waller v. Waller, 1 Grattan's Rep. 454; Jones v. Kea, 4 Dev. 301; 1 Williams on Ex'rs 48, 49; Edelyn v. Hardy, 7 H. & J. 61; Kendall v. Kendall, 24 Pick. 219; Bolling v. Bolling, 22 Ala. Rep. 826.

The testator might consider attesting and subscribing witnesses "as an essential part of the execution." If so, although he was mistaken in point of law, it proves he did not consider the paper as complete or as executed, if no witnesses subscribed and attested in his presence, as in this case.—Avery v. Pixley, 4 Mass. Rep. 460; 7 H. & J. 61.

If a will professes to pass both realty and personalty, and for the want of attestation is inoperative as to the former, "a strong intention of the testator may be inferred that it should not operate at all, unless it be available in every respect, or at least, as to both kinds of estate." But still, it is a question for

the jury, whether he intended the paper to operate as far as the law would allow it in its present form, or intended that, unless the law would regard it as effectual in all its dispositions, it should not be in any.—Jones v. Kea, 4 Devereux's (Law) Rep. 301; Kendall v. Kendall, 24 Pick. Rep. 219.

These questions having been passed on by the jury, as shown in each of the three verdicts, and the jury having found in each verdict the invalidity of the will, judgment ought to have been entered rejecting the paper. In the second verdict, the jury not only find the fact, that the paper "was not signed by the witnesses in the presence of the testator"; but they also, in addition thereto, "find the paper invalid as the last will and testament of Edward Henry."

The finding that the paper was invalid, may be regarded as a finding that the testator intended that the will should not operate at all, unless it was operative as to the realty as well as the personalty, and that it was inoperative as to the realty as well as the personalty, for the reason stated.

The paper is invalid, according to each verdict.—Edelyn v. Hardy's Lessee, 7 H. & J. 61.

This court is bound to exercise a superintending control over all inferior jurisdictions, and to see that the right of trial by jury remains inviolate. It should interfere by *mandamus*.—Commonwealth v. Porter, 10 Metcalf 282; 30 E. C. L. R. 135; 9 Mass. 388; 5 *ib.* 436; 3 Murph. 571.

White & Parsons, *contra:*

1. The writ of *mandamus* will be granted, only where there is a specific legal right, and no other legal remedy adequate to enforce that right.—*Ex parte* Jones, 1 Ala. 15; 6 Ala. 511.

2. This court will not revise the action of an inferior tribunal which involves a matter of discretion.

3. Is this matter of discretion? We insist it is. The court may grant a new trial. It may retrace its action during the term.—Johnson v. Luttemore, 7 Ala. 200. In this case, the court say: "Whatever may have been the reasons which induced the court to retrace its action, and recall its judgment, its effect was to leave the case as it originally stood." This is what the court, in terms, directs to be done.

4. But, we insist, that the action of the court was proper. It

is the right of a party to know whether one or all the issues are found against him, when his interest is involved in knowing. —Bouvier's Institutes, vol. 3, 500; 7 Porter 234; 2 Wash. 272; 2 Wheaton 221; White v. Baily, 14 Conn.; 6 Humph. 45; 1 Met. 383; 12 Pick. 15.

CHILTON, C. J.—The counsel for the motion, being dissatisfied with the opinion expressed at the last term of this court, filed his application for a re-hearing; and not having time to give it that examination which the importance of the case and the principle involved demanded (the application having been made on the eve of the adjournment of the court), we deemed it best to set aside the judgment, and hold the case under advisement, to afford us an opportunity for a more thorough investigation.

We have accordingly looked into the authorities cited, and many others not brought to our notice by the counsel; and the result of our investigation has but the more confirmed us in the correctness of the conclusion at which we previously arrived.

We are satisfied that the facts of the case presented by the record, accompanying the motion, do not justify us in granting the relief prayed for. The statute under which this contest originated, reads as follows: "When the validity of any will shall be contested, or doubts may arise as to its validity, or as to any facts, which, in the opinion of the judge, it may be necessary to have ascertained by the verdict of a jury, before awarding any order, judgment, or decree, such judge, at any stated session, or on any sitting held in vacation, according to the provisions of this act, may forthwith cause a jury to be summoned and empannelled, to try such issues, or inquire of such facts, as, under his direction, shall be submitted to their decision, and shall cause them to be sworn in such form as the case may require." Clay's Digest 304 § 35.

It is manifest from the reading of this section, that the Legislature designed to vest in the court trying the validity of a will, a more enlarged discretion than is ordinarily exercised by courts in trying issues in civil causes. The issues, in ordinary cases, are educed by the pleadings of the re-

spective parties; but in cases of wills, they are to be made up under the direction of the probate judge. If, in the opinion of the judge, it is necessary to have any fact ascertained, as preliminary to admitting the will to probate, this section of the act gives him the right to have the verdict of a jury upon that fact.

The pleadings in this case are not made out in form; but it was agreed, that the proponent should be regarded as tendering a formal issue, that "the paper propounded is the last will and testament of Edward Henry, deceased, and that the same is valid as such last will and testament"; and the contestants, by agreement, were "to be permitted to offer evidence to the three following points, as though the same had been legally and duly presented at length and in proper form, namely: That said paper is invalid as the last will and testament of Edward Henry, deceased; first, because the same was not signed by the subscribing witnesses thereto in the presence of the testator, Edward Henry; second, because, at the time of making said last will and testament, said Edward Henry was of unsound mind and memory; and, third, because said paper was obtained by fraud and undue influence on the part of Angelina Henry, wife of the said Edward Henry. And it was further agreed, that said contestants might be permitted to present each and all of these points in the charge of the court to the jury," &c.

Such is the form in which the issues were presented. Now, without attempting to determine upon the legal effect of this will, since upon this motion it would not be proper to construe it, we entertain no doubt, that a will may be good as to the personalty, and void as to the realty. The statute requiring the subscribing witnesses to sign the will in the presence of the testator, applies only to devises of real estate, and has no application to bequests of personal property; so that the first ground of objection *might* be true, and yet the will be valid as to the personal property, if it was really intended by the testator to operate as his will, irrespective of the attestation.

We fully concede the doctrine, that where a will, both of real and personal property, contains an attestation clause, unexecuted by the witnesses, the presumption is, that it was

left incomplete, and is not the will of the supposed testator. But this presumption is slight, and may be rebutted by slight circumstances; as if the testator was prevented from finishing it by the act of God, or that he intended it to operate in its present form.—See 2 Phil. 178; 1 Add. Rep. 158; 1 Hagg. 252; *ib.* 551; *ib.* 596; *ib.* 698; 3 *ib.* 207. So, also, in Buckle v. Buckle, 3 Phill. Rep. 323, the testamentary paper was found sealed up at the death of the testator, with an appearance that he did not intend to open it: *held* sufficient to rebut the presumption of its invalidity as a testamentary paper. So, also, if he recognize it as his will.—1 Hagg. 550; 1 Williams on Ex'rs 51–2, marg. Especially would this presumption be rebutted, if the testator, in his last illness, had signed it *as his will*, and called upon witnesses to attest it as such, who attested it informally. In such case, it is our opinion, that it would devolve on the party asserting its invalidity, to show that the testator regarded it as invalid by reason of such informality.

The jury found the will "invalid" by their first verdict; and, at the request of the contestants' counsel himself, inquiry was made of them by the court, as to which one of the grounds of contest they predicated their finding upon. The reply was, "principally on the ground that the will was not signed by the witnesses in the presence of the testator."—Here, then, the court was informed, by means to which the contestants could surely raise no objection, that the verdict was principally upon a ground which might, or might not, render the will, in judgment of law, invalid, according to circumstances. If the ground upon which the jury "principally" based their verdict, was the sole predicate for it, as they indicate by their second finding, the court was left in doubt as to what judgment to render. But when the second verdict was brought in, viz., that the will was invalid, because the subscribing witnesses failed to sign in the presence of the testator, the contestants, who now are moving to have judgment upon some one of these verdicts, requested that the court should send the jury back, to try the other issues as to the soundness of testator's mind and the alleged undue influence; and they were accordingly sent back. Why, we ask, were they sent back? The reason is obvious. The

special finding, that is, the *facts found*, went only to the invalidity of the will as respects the land; and although the jury say invalid generally, this is a conclusion of law, not warranted by the facts found without more, and the court, and not the jury, must judge of the law,—"*ad quæstionem juris, non respondent juratores, sed judices.*"—3 Thomas' Coke 391, top page. The court had the right to disregard the conclusion, and enter judgment according to the law arising upon the facts.

But there were other grounds of contest going to the whole will. These must be passed upon, to enable the court to dispose of the whole subject-matter of the litigation, and hence the jury were sent back,—sent back at the contestants' request, and it is not for *him* to say that this was improper. Even where the court has no power to grant a new trial, but does so, and the party submits to the new trial, he cannot have a *mandamus* for judgment on the first verdict (Weavel v. Lasher, 1 John. Cases 241); much less, where the court, upon his motion, had rejected the verdict itself.

The third verdict finds the legal conclusion, but the court is certified, that it is not predicated upon either one of the grounds of contest; and this the court rejected, as, under the statute above referred to, and the circumstances of this case, the judge had a perfect right to do.

In Parrott v. Thacher, 9 Pick. 431, Parker, C. J., in delivering the opinion of the court, said, "We certainly do not mean to encourage the practice of questioning jurors as to the grounds of their opinions; but where there are distinct grounds upon which the verdict may be given, perhaps it is not improper to ascertain which they adopted, as there may be little or no evidence upon one and sufficient upon another; and if it appear that they did not agree upon either of the grounds, I do not see how their verdict can stand, unanimity being required. If there are three distinct grounds upon which an action may be maintained, all independent of each other, and four only of the jury agree upon each, I do not see how they can amalgamate their opinions, and make a legal verdict of them." If this be correct with respect to ordinary trials, it applies with much greater force to cases like the present, where the facts are to be ascertained under the direction of the court.

We grant, that, under the general law governing trials, the

jury are never bound to find a special verdict. They are bound, however, to receive the law from the court, when given them in charge, and they may always apply the law to the facts, and find a general verdict, which is thus composed of law and fact. But as respects contests of this character, which involve the validity of wills, the statute, for obvious reasons, gives the court the power to require the jury to find facts, and the issues are to be tried by the jury under its direction. The will embracing both real and personal property, he must be certified by their finding as to all the facts necessary to enable him to pronounce upon it as to both; otherwise, with the means at hand of being enlightened, he would be compelled to grope in the dark, and possibly to pronounce a judgment neither satisfactory to himself, nor just to the parties. The jury retired each time with specific directions from the court, as to the manner of their finding, requiring them to pass upon each one of the grounds on which the contestants relied for invalidating the will. They persisted in a refusal to comply, and the court decided that their verdict was insufficient and refused to receive it. To reverse this decision of the court, and to cause judgment to be entered on either of the verdicts, by awarding a *mandamus*, and this upon the application of the party at whose instance inquiry was first made as to the facts found by the jury, and upon whose motion the second verdict was rejected, would be virtually to repeal the statute before mentioned,—would be to render a judgment upon an uncertain and unsatisfactory verdict: would, in effect, make the jury triers of the law, leaving the court to grope in the dark for the facts; would be to trample upon the discretion of the primary court, who, had the verdict been received, had a right to set it aside and grant a new trial, which right, being discretionary, is not subject to revision in this or any other court; in short, it would be an unwarranted assumption of jurisdiction, unsanctioned by principle, and unsustained by any precedent, either English or American.

There are a few cases, it is true, which seem to countenance the idea of forcing verdicts upon courts, which have the right, in the exercise of their sound discretion, to set them aside, and award new trials.—*Ex parte* Caykendoll, 6 Cow. Rep. 53, in which the court below had received improperly the affidavits of some of the jurors as to a mistake made by them in making up

their verdict, and had awarded a new trial; the Supreme Court of New York granted a *mandamus*, for vacating the order, and for judgment on the verdict. The point in question was not discussed, either by the counsel or the court, and no authority, except as to the impropriety of receiving the affidavits of jurors to impeach their verdict, was cited. Suppose the primary court, in answer to the rule *nisi*, had returned, "True, we received the affidavits, but gave them no force; we heard the evidence, and upon the merits, in the exercise of our discretion, we set aside the verdict," could the Supreme Court rightfully have controlled that discretion? In *Ex parte* Bacon & Lyon, in the same volume, p. 393, in the matter of vacating an order setting aside a default by the Common Pleas, the same court furnishes an answer to this inquiry: "The Common Pleas must be their own judges, upon the circumstances before them, whether they will set aside a default upon the merits. This is so much a matter of discretion, that we will not interfere by *mandamus*."

Another case occurs in 9 Mass. Rep. 370 (Commonwealth v. The Justices of the Sessions for the County of Middlesex), where the Common Pleas had set aside a verdict of a jury, which found that the owner of land over which a highway had been laid out, had sustained no damage thereby; and the Supreme Court awarded an alternative *mandamus* to the Common Pleas, to receive and record the verdict, or to show cause &c. The point in this, as in the preceding case, was not discussed; no authority is cited, and it does not appear to have received much consideration. Besides, a note by Mr. Rand, the editor of the 3d edition, clearly shows, that it was, in effect, controlling the discretion of the primary court, and was, therefore, unwarranted either upon principle or authority. This case was pressed upon the same court, differently organized, in Gray v. Bridge, 11 Pickering's Rep. 189; but the court said: "This application [to set aside the order granting a new trial, and to enter judgment on the verdict] is founded on the supposed error of the court below in admitting proof of the confessions of Usher, which, the petitioner's counsel contended, were not competent evidence. But in deciding this case, it is not necessary to consider the question as to the competency of the evidence, because we think it very clear, that the Court of Common Pleas had a

discretionary power to grant a new trial, if the justice of the case, in their opinion, required it, and that we ought not to attempt to control or coerce the discretion of that court." This decision conforms to the law, as we understand it, and accords, too, with the English cases upon that doctrine.—See 2 Bar. & Cres. 286; 4 B. & Adol. 300; 1 Chitty's Rep. 643; *ib.* 37; 2 *ib.* 257; 3 Adol. & El. 725. The case last cited bears a striking analogy to this, in some respects. Hewes was indicted for administering poison to three mares, in some meal, of which they ate and died. The jury returned their verdict as follows: "Guilty by mischance." His counsel insisted that the verdict amounted to an acquittal; but the chairman of the Criminal Court told them to retire and find him either guilty or not guilty. They retired, and returned a verdict: "Guilty, but recommended to mercy." The chairman asked them on what ground they made their recommendation. They replied, "We recommend to mercy on the ground that he did not do it with a malicious intent, but did it to benefit the condition of the horses." Thereupon the last verdict was received, and sentence of conviction entered. The motion was made by the defendant's counsel, to the King's Bench, for a *mandamus*, to cancel the alteration; but it was refused. Littledale, J., said: "I rest my judgment, however, upon the broad ground, that we have no right to interfere, in this respect, with the practice of the court below." Patteson, J.—"I have always understood that this court might send a *mandamus* to an inferior court to do its duty, in general terms, but not to do a particular thing; as to make an alteration, &c., in the minutes." Williams, J., said: "The writ is granted only to set parties in motion, where they have refused to act."

But it is unnecessary to multiply authorities. Although this court has the power to control and supervise the action of the inferior courts, yet this must be done in a manner recognized by law, and so as to leave them untrammeled in the exercise of the discretionary powers vested in them.

Let the motion be denied, with costs.

REESE *vs.* BECK, EXECUTOR, &c.

1. It is no objection to a deposition taken on interrogatories, that in stating the name of the case in the commission, the plaintiff is represented as suing individually, instead of as executor; the commission, in such case, may be amended by the interrogatories.
2. The deposition of a witness may be taken, on the affidavit of the attorney of the party wishing it that the witness is unable to attend court because of sickness and great bodily infirmity.
3. Where notice of the taking of a deposition on interrogatories is addressed to the attorneys at law, by their firm name (without stating that they are attorneys at law), by whom the declaration was filed, it will be presumed, in the absence of any denial on their part, to have been addressed to them in the same character in which they filed the declaration; and if the notice is executed by the sheriff on a person bearing the same name with one of the partners of the firm, it will be presumed that the sheriff did his duty, and that the person on whom the notice was served was a partner of the firm.
4. When a deposition is taken in strict conformity to the statute, in every particular, except that the commissioner neglects to attach his seal to his certificate, an objection to its regularity comes too late at the trial.
5. Where the vendee is allowed until the end of the year to determine whether a conditional sale shall become absolute, he may make his election at any time before the expiration of the year, and is not confined to the last day of the year only.
6. A charge, when asked by either party, or affirmatively given by the court, should be so framed as not to exclude from the consideration of the jury any portion of the evidence which might exert an influence over their verdict.

ERROR to the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

DETINUE for a slave, by Thomas K. Beck, as executor of Ephraim Pharr, deceased, against James T. Reese. The plaintiff proved a purchase of the slave by his testator, in 1845, at a sale by the trustee in a deed of trust executed by one Bushrod W. Bell; also, the defendant's possession at the commencement of the suit, a demand and refusal, and the value of the slave and his hire.

The defendant then offered in evidence the deposition of one Isaac M. Thomas, taken on interrogatories, which the court, on motion of the plaintiff, suppressed for supposed irregularities; but as these irregularities are particularly noticed in the opinion,

it is not necessary to repeat them here. The defendant derived title under a purchase by his wife, then Mrs. Bell, from said Ephraim Pharr; but the evidence was conflicting as to the terms of this contract. The evidence in relation to it, so far as material to an understanding of the case, is stated in the opinion. The first charge of the court was not excepted to. The second charge, in effect, was as follows: If the jury believed that the contract between Pharr and Mrs. Bell was, that she should keep the boy during the year 1846, and at the end of that year might elect to keep him on paying $700, or to return him and pay $100 for his hire; and that she expressed her willingness to plaintiff, some time in November of that year, to take the boy at $700, and plaintiff then repudiated the contract; yet this would not dispense with the necessity of making a tender of the $700 at the end of the year 1846; and if the tender was not made, then plaintiff was entitled to recover. To this charge the defendant excepted, and asked the court to charge, that if the jury believed the contract to have been as stated in the last charge, then Mrs. Bell had the right to make her election at any time during the year 1846; and if she did make her election at any time before the expiration of the year, and offered to pay the $700, then they must find for the defendant. The court refused this charge, and the defendant excepted.

The rulings of the court in suppressing the deposition of Thomas, in the second charge given, and in the refusal to charge as requested, are now assigned for error.

White & Parsons, and J. J. Woodward, for plaintiff in error:

1. The affidavit, by an attorney, made upon information and belief, is sufficient.—Brahan v. Debrill, 1 S. 14. A deposition must be certified under the signature of the commissioner, but the certificate must be under his seal.—Dozier v. Joyce, 8 Porter 303; Hill v. Gayle, 1 Ala. 275. The omission to describe the defendant, Beck, as executor, was not sufficient ground for suppressing the deposition.—Jordan v. Hazzard, 10 Ala. 221; and see, also, Evans v. Norris, 1 Ala. 511. The notice is good.—1 Ala. 632; 11 Ala. 732; see Acts 1849–50, p. 73, §§ 6, 1.

2. The first principle, in the construction of contracts, is,

to carry out, if possible, the intention of the parties; not in a literal, but in a just and reasonable sense. On the construction of this contract, and its legal effect, see Barker v. Jones, 8 New Hampshire, 413; McLeod v. Powe & Smith, 12 Ala. 9; Lamb v. Lathrop, 13 Wendell 95; Sewall v. Henry, 9 Ala. 24. See also Chitty on Contracts, p. 11, *et seq.* to p. 14. Mrs. Bell was excused from an offer to perform by the act of Beck repudiating the contract.—Chitty on Contracts 689. And a party may subject himself to liability before the time of performance arrives.—Chitty on Contracts 731, 742; 20 Pick. 111; 25 *ib.* 455; 5 Ohio 514.

The case in 7 Barb. does not apply. It is founded on a statute which does not warrant the court in saying what is a substantial compliance with the provisions of it. The court say, it must be strictly construed. That is directly contrary to the intention of the Legislature in passing ours. This and the other cases cited by defendant's counsel in support of the decision of the court below, suppressing the deposition of Isaac M. Thomas, do not apply.

The law does not require a party to do a useless act: therefore, when Mrs. Bell offered to take the boy, and comply with the contract, and Beck refused it, and said she should not have the slave, it was unnecessary for her to make the tender in form at the end of the year.

Rice & Morgan, *contra*:

1. Under the third section of the act of 12th February, 1850 (Pamphlet Acts of 1849–50, p. 75), it is essential that the commissioner shall, under his hand and seal, below the testimony, or on some convenient place in the papers, certify to the clerk of the proper court, or to the justice, that the evidence of the witness was taken down under oath, and subscribed by him, in his presence, at a time and place appointed by him," &c, &c. This act repealed all former acts contravening its provisions, and designedly provides the mode of procedure under commissions to take testimony. If the mode thus prescribed is not substantially pursued, the deposition must be suppressed on motion; for no court in this State can dispense with any requisition of a statute. If the "seal" of a commissioner can be dispensed with, any other part of the certificate can be dis-

pensed with; and upon such reasoning, the certificate itself can be dispensed with. Depositions are in derogation of the common law, and owe their origin and authority to statutes. The statute must be observed; no excuse can supply the non-observance of the statute.—Caldwell v. Mayor, &c., 9 Paige's Rep. 572; Fleming v. Hollenback, 7 Barb. Sup. C. Rep. 274; Shed v. Leslie, 22 Vermont 498; Whitney v. Sears, 16 *ib.* 591; Sanford v. Octalomi, 23 Ala.

The correctness of this position is rendered the more certain, by a reference to the statutes in relation to depositions which were of force prior to the act of 1850, and the construction put upon those statutes by the Supreme Court.—Dozier v. Joyce, 8 Porter 303; Hill v. Gayle & Power, 1 Ala. 275. In this case last cited (1 Ala. 275), the court assign the reason why the "seal" of the commissioner was not essential under the laws then of force, as follows. "Neither of our statutes prescribing the manner in which depositions are to be taken, requires that the commissioners should attest the genuineness of the examination by certificate under their hand and seals." Ten years after this decision had been made, the Legislature passed the act of 1850, and did thereby expressly require the seal of the commissioner "below the testimony, or on some convenient place in the paper." This legislation annuls the former law, and the decisions thereon founded.

There are other grounds which justified the suppression of the deposition of Thomas; for instance, the pretended notice is a mere nullity. It is not a notice. It is not addressed or directed to either of the parties to this suit, nor to the attorneys of either of the parties, but "to Messrs. Rice & Morgan," not as attorneys of any party, but simply to "Rice & Morgan." This pretended notice was not served on Rice and Morgan, but on "John T. Morgan, Esq." The pretended notice asserts that "the above int'ries are on file in the "proper office," and that a commission will issue according to law."—Rex v. Croke, 1 Cowper's Rep. 26, 30; Shehan v. Hampton, 8 Ala. 942. The commission does not appear to have been issued in this case, but in a case "wherein Thomas K. Beck is plaintiff, and James T. Reese is defendant." There is a material difference between Beck and Beck "executor of the last will and testament of Ephraim Pharr, deceased, who sues as such

executor."—Chapman, Governor &c., v. Spence *et al.*, 22 Ala. There was no proof offered that Beck, in his individual right, did not have a suit against Reese in the same court.

The commission derives its efficacy from the law. By law, all the power conferred on the commissioner named in the commission, ceases on the return day of the commission. After the return day, he ceases to be commissioner, and cannot add a seal or do any other act as commissioner.—Herndon v. Givens, 16 Ala. 261; Ulmer v. Austill, 9 Porter 157. After the return day of the commission, and after the commission and the acts of the commissioner under it have been actually returned to and filed in the court to which it was returnable, the court has no power to re-commit the commission or any thing done under it to the commissioner. And if it were to do so, its action would be void, and every thing done under such re-commitment would be void.—Snell v. Bangor Navigation Co., 30 Maine 337; Wentworth v. Keazer, 20 *ib.* 336.

A contract between E. Pharr and Mrs. Bell, "that she was to keep the boy (a slave) during the year 1846, and at the end of that year had her choice to keep the negro on paying $700, or to return him and pay $100 for the hire," does not divest Pharr of his title to the negro; nor will such agreement, in connexion with the expression by Mrs. Bell in November, 1846, to Pharr's executor, of "her willingness to take the boy at $700," operate a divestiture of title to the negro out of Pharr or his executor; especially if there is no payment of the $700, and no tender of it, and no expression of readiness or ability to pay it, and no offer to pay it, but merely an expression of "her willingness to take the boy at $700."—Eskridge v. Glover, 5 Stew. & Por. 264, and cases there cited; Cook v. Oxley, 3 T. R. 654; Grant v. King, 14 Vermont 367; Buckmaster v. Smith, 22 *ib.* 203; Smith v. Foster, 18 *ib.* 182; Bigelow v. Huntley, 8 *ib.* 151; Falls v. Gaither, 9 Porter 605; Chitty on Contracts (edition of 1851), 344, note 1.

The utmost effect which can legally be assigned to such an agreement is, that it constituted a bailment or hiring of the slave to Mrs. Bell for the year 1846, at the price of $100, with the privilege to her, "at the end of the year" (the expiration of the term of hiring), of relieving herself from returning the slave and paying the hire, "on paying $700."—Grant v.

King, 14 Vermont 369. Or, it is "an agreement to sell the property on condition of receiving payment within a stipulated time.—George v. Stubbs, 26 Maine 247. Such an agreement is not a sale. She was not bound by it to pay for the slave. She was not a purchaser, but had the mere option to become a purchaser "at the end of that year." "While the agreement continued the option to her, the law gave it to Pharr or his representative.—Eskridge v. Glover, 5 Stew. & Por. 274, 275. "The important but nice distinction is," that this contract was not a sale of the slave "with only a reservation of the right to one to renounce it; but the agreement was, that it should become a sale, if, at the end of that year," Mrs. Bell should choose to buy the slave and "pay $700" for him.—Eskridge v. Glover, 5 S. & P. 275, *supra*; 9 Porter 605; George v. Stubbs, 26 Maine 247. This was not a conditional sale, since it was to be optional with Mrs. Bell, "at the end" of the year 1846, whether any sale should take place.—Grant v. King, 14 Vermont 370. In these respects, as well as in others, this case is distinguishable from the case of McLeod v. Powe & Smith, 12 Ala. 9, so much relied on by plaintiff in error.

Without designating all the differences between the case last cited and this, it may not be improper to notice, that in that case there was a valid agreement in writing that Gordon should become the purchaser of Smith's slaves at the marshal's sale; that Gordon did purchase the slaves under the agreement; that it was also agreed, that on the payment of $4,832 by Smith to Gordon, on the 1st January, 1844, the said slaves should revest in Smith; that, "on the 26th December, 1843, with a view to carry out said contract," said sum of $4,832 was duly tendered. This was a conditional sale—a sale to Smith on condition that he paid the $4,832 by the 1st January, 1844. The judgment in the action of *detinue* concerning said slaves, was never brought to the Supreme Court, but remained of force when McLeod v. Powe & Smith was tried, and was part of the evidence in that case. In the present case, no tender has ever been made, and there is no sale, conditional or otherwise.

The actual delivery of goods does not, of itself, transfer an actual ownership in them; to perfect the title of the vendee, there must be a consummation of the contract of sale. The fact that Mrs. Bell had the slave, does not prove that the title

was changed by the delivery to her. It is plain, the title was not thereby changed.—Marston v. Baldwin, 17 Mass. 606, 611. The expression by Mrs. Bell "of her willingness to take the boy at $700," made to the executor of Pharr, in November, 1846, is not, and was not, a tender of $700. No money was produced. There was no offer to pay any money. A tender of $700, is a very different thing from an expression by Mrs. Bell of her willingness to take the boy at $700.—9 Porter 615; 14 Viner's Abr. 19 § 4; Flower's Case, which shows that a mere offer will not change the title. If the executor "repudiated the contract" in November, 1846, that did not relieve Mrs. Bell from tendering the $700. Whether she made any tender was referred to the jury by the second charge; and in finding for the executor under the second charge, the jury found she made no tender. That finding ought to settle that question of fact, at least in the appellate court.

But the charge, as given, is justified upon another clear ground: "Where the estate is to arise upon a condition precedent (as, "on paying $700"), it cannot vest till that condition is performed; and this has been so strongly adhered to, that even where the condition had become impossible, no estate or interest grew thereupon."—Vanboone v. Dorrance, 2 Dallas 317; 2 Bacon's Abr. 292; Edwards v. Lewis, 18 Ala. 495. The payment of the $700 was a condition precedent, in this case, and was never performed.—Falls v. Gaither, 9 Porter 617. The agreement between Pharr and Mrs. Bell, operated as a mere license to Mrs. Bell to buy at the end of the year on paying $700. Such license was revoked by Pharr's death, or, at all events, by the executor.

The charge asked was properly refused.—See authorities above cited. There is one objection fatal to the charge asked. If it had been given as asked, and without any explanation, and the jury believed the state of facts on which it was based, the jury would have been bound thereby to "find for defendant," although the jury might have believed there had been "a rescission of the contract"—of which rescisssion there was evidence. Inasmuch as there was evidence tending to prove a rescission of the contract, and inasmuch as such rescission (if it existed) was fatal to the defendant below, any charge asked by him might well be refused, which excluded the question of the

rescission of the contract from the consideration of the jury, and authorized the jury to "find for defendant," although they might believe there had been a rescission. If the charge as asked had been given, an explanation thereof would have been necessary, and such an explanation as would have amounted to a remodeling of that charge.—Ross v. Ross, 20 Ala. 105; 19 Ala. 322.

LIGON, J.—The errors assigned in this case relate, 1st, to the rejection of the deposition of the witness Thomas; and, 2nd, to the charges given and refused by the court.

1. In relation to the deposition of Thomas, the plaintiff moved its suppression on the trial, for supposed irregularities in the *dedimus*, in the notice to the plaintiff, the affidavit to procure its issue, and the certificate of the commissioner who took it.

The first objection is founded on the manner in which the parties to the suit are stated in the *dedimus*. The style of the case is there set out, as "Thomas K. Beck plaintiff, and James T. Reese defendant;" when the writ and declaration are in the name of Thomas K. Beck, as executor of Ephraim Pharr, deceased. We are inclined to think this objection entirely too technical to be allowed to prevail in any case, as the commission may be amended by the other parts of the record, which clearly show in what character the plaintiff sues.—Jordan v. Hazzard, 10 Ala. 221; Evans v. Norris, 1 Ala. 511. In the case under consideration, the commission issued on interrogatories filed in the office of the clerk, which are required to accompany it. To these we may well look, in order to supply any omission of the clerk in stating the style of the case in the *dedimus*, as well as to the affidavit on which it issues. In both the interrogatories and the affidavit accompanying this commission, the style of the case is set out as it is in the writ and declaration.

The objection to the affidavit cannot be sustained. It is made by the attorney for the defendant, sets out that the testimony of the witness is material to the defendant, and that the affiant has been informed and believes that the witness is unable to attend court because of sickness and great bodily infirmity. The reason why the *deposition* of the witness is sought, is one of the grounds on which it is allowable to take the depo-

sition of a resident witness. The bodily infirmity of the witness need not, as it is supposed, be referable only to his *age*, before the law will excuse his personal attendance, and authorize his deposition to be taken. His inability to attend court arising from bodily infirmity, superinduced from any cause, is sufficient. The deposition is only *de bene esse*, at best, and may be excluded, if, at the time of the trial, it is made to appear to the court, that the witness has been relieved, and is able to give his personal attendance.—Sess. Acts 1849–'50, p. 73, § 1.

The fact that the affidavit is made by the attorney, and not the party himself, does not vitiate it.—Brahan v. Debrill, 1 Stew. 14; Sess. Acts 1849–'50, § § 1–6, p. 73.

The objection taken to the notice of filing the interrogatories, and suing out the commission, is equally unavailing. It appears at the foot of the interrogatories, in the margin of which the style of the case is correctly stated, and is addressed to Messrs. Rice & Morgan. It is objected that it does not style these gentlemen attorneys for the plaintiff, and that it appears to have been served by the sheriff on John T. Morgan, Esq. Unless notice is denied to have been received by the party entitled to it, the court will not look into the manner or form in which it was given.—Milton v. Rowland, 11 Ala. 732. We think, however, that this record shows affirmatively that notice in writing was given to the plaintiff's attorneys. It is true, they are not styled attorneys at law, in the notice itself; but upon reference to the declaration we perceive it is filed by Rice & Morgan, to whom, by their firm name, this notice is addressed, and the court will presume, in the absence of any denial on their part, that it was addressed to them in the same character in which they filed the declaration in this case. For the same reason, that is, a failure to deny the fact by the plaintiff or his attorneys, we will presume that the sheriff did his duty, and that the John T. Morgan named in his return, is the partner of the firm of Rice & Morgan. Had this been denied in the court below, the sheriff might have been allowed to amend his return, and thus remove all ambiguity, for it amounts to nothing more. The last reason given against the propriety of allowing this deposition to be read, is predicated on the third section of the act of 1849–50, Sess. Acts p. 73-4, which prescribes how depositions under that act shall be taken, and among other

things directs, that "the commissioner shall, under his hand and seal, below the testimony, or on some convenient place in the papers, certify to the clerk of the proper court, or to the justice, that the evidence of the witness was taken down under oath, and subscribed by him in his presence, at a time and place appointed by him," &c.

The deposition which the court below suppressed in this case, is taken with strict regard to every requirement of this statute, except in respect to the seal of the commissioner. No objection lies to the competency of the witness, or the relevancy of the evidence. The defect complained of is a mere irregularity of the form in which the relevant evidence, of a competent witness, is attested by the commissioner who took it under lawful authority. In other words, it is a defect of *form*; but this form is required by the statute, and the certificate is incomplete without it. If the objection had been taken at the proper time, it might probably have been allowed to prevail. But under the more recent decisions of this court, it is now well settled, that objections made to a deposition for irregularities in taking it, come too late when made for the first time at the hearing or trial of the cause.—Jourdan v. Jourdan, 17 Ala. 466; Colgin v. Redman, 20 Ala. 650.

For these reasons, we think, the court below erred in suppressing the deposition of the witness Thomas.

2. The next assignment of error is predicated upon the second affirmative charge of the court, which is in these words: "If they (the jury) believe from the evidence, that the contract between Ephraim Pharr and Mrs. Bell was, that she was to keep the boy during the year 1846, and at the end of that year had her choice to keep the negro on paying $700, or to return him and pay $100 for his hire; and that sometime in the month of November of that year she expressed her willingness to the plaintiff to take the boy at $700, and the plaintiff repudiated the contract, yet this did not dispense with the necessity of Mrs. Bell's making a tender at the end of the year 1846; and if the tender was not made, then the plaintiff was not entitled to recover."

This charge cannot be supported. The evidence tends strongly to show, that the contract between Pharr and Mrs. Bell amounted to a conditional sale of the slave in controversy

by the former to the latter, by which the latter was allowed until the end of the year 1846 to determine whether it should become absolute. The testimony also conduced to show, that in November, 1846, (Pharr having died in the meantime, and the plaintiff having become his executor,) Mrs. Bell made her election, and announced to the plaintiff her determination to retain the slave, and treat the contract as a sale, and not as a bailment by way of hire, at the same time offering to perform her part of the contract of sale; but the plaintiff repudiated the contract of his testator. From this moment the title to the slave vested absolutely in Mrs. Bell; and if it had died between that period and the 1st day of January, 1847, there can be no question that the loss would have fallen on her, and the death of the slave would have formed no defence in an action against her by the present plaintiff, in his representative capacity, for the purchase money.—McLeod v. Powe & Smith, 12 Ala. 9. This charge is essentially erroneous, in confining Mrs. Bell's right of election to the last of the year 1846. She had the right to determine whether she would treat the contract as a sale, at any time after it was made, and before the end of the year. If she did make her election in November, the sale was complete, and the end of the year had nothing more to do with the contract, except to fix the time when the purchase money should fall due. Under this charge, the jury were prohibited from looking to, and passing upon, the testimony of Mrs. McMeans and other witnesses, who had testified in relation to the conversation and conduct of Mrs. Bell and the plaintiff in November, 1846, and of saying whether what occurred at that time amounted to an election by the latter to treat the contract as a sale, and an offer on her part to perform its stipulations, from which she was hindered by the defendant, who repudiated the contract altogether. The charge confines the right of Mrs. Bell to perform the terms of the agreement on her part *to a single day*, when we think she might have made her election, and paid or tendered the purchase money, on the last day of the year, or at any time subsequent to the date of the agreement and the last day of the year. In the case of McLeod v. Powe & Smith, *supra*, the agreement between the parties, as it is recited by the court, was, that the money should be paid on the 1st day of January, 1844, and the only proof of tender

was on the 26th day of December, 1843; yet this was held to be sufficient to vest the title of the slaves in the vendee, and left the vendor only his right of action for the purchase money. So, in the present case, if the testimony is sufficient to show an offer by Mrs. Bell to pay the purchase money, in November, and a refusal by Beck to receive it, it would have been all that could be required to be done to vest the title of the slave in her, without the necessity of again offering to make the payment on the last day of the year. This part of the case, with proper directions as to what would amount to a tender on the part of the vendee, and what acts of the plaintiff would amount to a waiver of the necessity of a formal tender, should have been submitted to the jury. The vice of the charge under examination, is, that this was not only not done, but the jury were virtually instructed that this proof had nothing to do with the point in issue between the parties. We express no opinion as to the conclusiveness of the proof in relation to the tender of the money, or the offer to perform her part of the contract by Mrs. Bell, in the month of November, 1846; that is a matter for the jury. We only decide that she had the right, under the contract, to make the tender at that time, and if it was made and refused, she was not bound to renew it on the last day of the year.

3. The charge asked by the defendant, was correctly refused by the court. All charges must be given with reference to the proof in the case, and when asked by either party, or affirmatively given by the court, should be so framed as not to exclude from the consideration of the jury any portion of the evidence which might exert an influence over their verdict. There is some evidence in this record in relation to a rescission of the contract between Pharr and Mrs. Bell. The testimony on this point is said to have been conflicting. The charge asked demands a verdict for the defendant, without reference to the fact as to whether the contract had or had not been rescinded by the parties. The court was not bound to qualify it, and without this qualification it was correctly refused.

For the errors heretofore pointed out, the judgment must be reversed, and the cause remanded.

NIXON *vs.* ROBBINS, EXECUTOR &c.

1. Where conditional words are used in a will, which, if unexplained, would prevent the vesting of a legacy, such words will not be allowed to defeat the intention of the testator, when apparent from other portions of the will, that the legacy should vest immediately; and where an absolute property is bequeathed to one at a certain period *in futuro*, and the whole of the intermediate interest is given to another, the legatee of the absolute property takes a vested interest.
2. Where a testator bequeathed certain slaves to his daughter, "during her natural life, with this *proviso: that if her son Thomas, now an infant, should live to be twenty-one years of age,*" then he gave three of said negroes to his said grandson, "to him and to his heirs forever," *it was held*, that the legacy to the testator's grandson was contingent, and did not vest until he arrived at the age of twenty-one years.
3. An executor's assent to the legacy of a life interest in slaves, operate as an assent on his part to the legacy of a vested remainder in them; but if the remainder is contingent, and the interest in the property during the interval between the termination of the life estate and the happening of the contingency on which the remainder is to vest, is not disposed of by the will, it must be administered accordingly by the executor, and his assent to the legacy for life will have no effect whatever on the remainder.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

DETINUE for certain slaves, by the executor of John Robbins, deceased, against Richard J. Nixon. Both parties claimed under the will of said John Robbins, which contained the following clause:

"I lend unto my daughter Mary Nixon the following negro slaves, viz., Peter, Esther, Michael, Armstead, and Little Fanny (Little Fanny she is not to have till the death of my wife), and one negro girl named Rose, during her natural life; with this proviso: that if her son, Thomas Nixon, now an infant, should live to be twenty-one years of age, I give unto him, the said Thomas Nixon, three of the negroes which I have loaned my daughter Mary, viz., Rose, Armstead and Michael, to him and his heirs forever; and after the death of my daughter Mary, the negroes I have loaned to her (for) her natural life, except the three I have given to

my grandson Thomas Nixon, I give and bequeath (to) her children lawfully begotten of her body."

The negroes sued for are the three above named which were bequeathed to said Thomas Nixon. The defendant was the husband of said Mary Nixon, who had died before the commencement of this suit, and the father and guardian of said Thomas, who was shown to be seven or eight years of age; and he received the slaves, in right of his wife, from the executor. Upon these facts, the court charged the jury, that the plaintiff was entitled to recover; to which charge the defendant excepted, and which he now assigns for error.

William M. Murphy, for the appellant:

1. The will of John Robbins, Sr., creates a vested remainder in his grandson, Thomas Nixon.—Farley v. Gilmer *et al.*, 12 Ala. 141. In the case cited, on page 144, it is said: "A devise of freehold to A when he shall attain twenty-one years, will vest immediately in A, whether the devise be immediate or only in remainder." In this case, this court, in the construction of the will, looked to the intention of the testator. John Robbins believed that bequest vested these slaves in his grandson. After making the bequest to his daughter and grandson, he says: "The negroes I have loaned to her, for her natural life, except the three I have given to my grandson, Thomas Nixon, I give and bequeath her children lawfully begotten of her body." This lot of negroes was set apart by the testator to the family of this daughter; and supposing that he had given three to his grandson Thomas, he makes no further disposition of them, but he does of the other slaves, "to her children lawfully begotten of her body." Again; by reference to the whole will, it will be seen that the testator disposed of his whole estate to his children.—See, particularly, Boraston's Case, 3 Co. 19b; Mansfield v. Dugard, Gill. Eq. R.

2. The proviso is applicable alone to the estate given to the daughter Mary Nixon. "I lend unto my daughter (the slaves naming them) during her natural life; with this proviso, that if her son, Thomas Nixon, should live to be twenty-one." The wife took a life estate, *provided* Thomas Nixon should not live to be twenty-one; but provided he did live to be twenty-one, then a term for years. To test the application of this proviso,

and to show that it applies to the estate that Mary Nixon was to take, look at the words preceding it. Those words create an estate for life. The proviso, however, qualifies it, and converts an estate for life to the attainment of the majority of her infant son Thomas. Again; this is a loan to Mary Nixon for life, or for years. The contingency contended for is intended for her estate. As to the grandson, the gift was, by the intention of the testator, postponed until he was twenty-one.

3. This court, as to remainders and executory devises, applies to slaves the laws applicable to real estate. In the case of Doe, lessee of Hunt, v. Moore, 14 East 604, Lord Ellenborough says, "that according to the rule established by the decisions on the devises of real estate, a devise to A when he attain twenty-one, to hold to him and his heirs, and if he die under twenty-one, then over, does not make the devisee attaining twenty-one a condition precedent to the interest vesting in him, but the dying under twenty-one is a condition subsequent on which the estate is to be divested." In Roper on Legacies, vol. 1, 387, there is a class of cases cited applicable to this. "When the period of payment or enjoyment of the fund is deferred until the legatee attain the age of twenty-one, but in the mean time the property is given to a parent," &c., "the words 'when' or 'after,' which import a condition precedent to the vesting of the legacy, will not be permitted to produce that effect; but on the contrary, will be merely descriptive of the time when the legatee will be let into possession;" "the reason why it was not given sooner to the legatee, was from regard to his convenience, as it could not be given conveniently to a person of his age.—See Goodtitle v. Whitby, 1 Burr. p. 232; 9 Vesey 230. The intention of the testator, in the case at bar, was to carve out this estate to the mother for the convenience and benefit of her son, Thomas Nixon, who was an infant and unable to take care of his legacy. This is evident from the fact, that the moment he shall become capable of its management he is to take. Upon this point, that this estate vested in Thomas Nixon, the cases decided in North Carolina are in point. In Johnson, adm'r, v. Baker, 3 Murphy 318, "testator gave to his wife all the property he received with her, and the rest of his estate he gave her till his son should come to lawful age, when the same should belong to him." The widow died, leav-

ing the son surviving her. The court say: "The words 'till his son comes to lawful age, when the property should belong to him,' do not import a contingency; they only mark the time when the remainder limited by the will is to vest in possession; the devise being considered as made subject to the intermediate estate created out of it, and made an exception to it." On page 321, the court say: "The determination, in this case, does not conflict with the rule, that where a devise is made to a person when he shall attain twenty-one, without any disposition of the property in the mean time, that generally such devise or bequest is conditional, and will not vest before the arrival of that period. But an exception is made to the rule, where the testator has disposed of the intermediate interest, either to a stranger or legatee. It was upon this distinction that the case of Perry v. Rhodes' Adm'r was decided (1 Law R. 82.)" In the case of Perry v. Rhodes, 1 Carolina Law Repository, on page 84, "the intermediate interest is given to the wife, doubtless, with a view to the benefit of the children, as well as to herself; and it has been held, that where the intermediate interest is given, either to a stranger or to the legatee himself, such a case forms an exception to the distinction which has been stated, because it explains the reason why the time of payment on division, as in this case, was postponed, and is perfectly consistent with the intention of the testator that the legacy should immediately vest."

4. The executor, in this case, cannot recover, having assented to the legacy, and delivered it.—Adm'r of Cross v. Terlington, 2 Murphy's (N. C.) R. p. 6. This case decides, that an administrator cannot bring trover for a chattel, after his consent that defendant shall have it before administration granted.—"After the assent of the executor to a specific legacy, the legal property in the thing is completely vested in the legatee, nor can it, at law, be divested by the creditors of the testator, and a *fieri facias* against the goods of the testator cannot be levied upon it.—2 Lomax on Ex. 134; Hunter, ex'r, v. Green, 22 Ala. 338.

5. In North Carolina it has been decided, as to the assent, that the general rule cannot be doubted, that where a legacy is limited over by way of remainder or executory devise, the executor's assent to the first taker is good as to all subsequent

takers.—Dumander's Ex'rs v. Carrington, 1 Murphy 468. In the case at bar, there is no further trust or duty to perform; and it has been decided in North Carolina, that where that is the case there is no responsibility on the executor.

6. After the legacy is assented to, and the property delivered to the legatee, there is no further privity.—Redmond v. Coffin, 2 Dev. Eq. (N. C.) 437; see particularly the opinion of Judge Ruffin, p. 444); Saunders v. Gatlin, 1 Dev. & Bat. Eq. 86.

7. Upon what principle can this property revert to the executor? There are no duties required by the will to be executed, which have not been discharged; there are no responsibilities. The case of Williamson and Wife v. Lucy Mason, 23 Ala. 488, decides that the executor of the person taking the life estate was entitled to the property, to hold as trustee for the children of Lucy Mason, by virtue of the terms of the deed; it having been decided that the contingent remainder under the deed could be supported by the estate continuing in the executors of the persons owning the life estate. Here the executor of the persons entitled to the life estate are not suing. The case of McWilliams v. Ramsay, 23 Ala., does not apply.—There the deed expressly requires that the title and property shall revert to the grantor if living, and if dead shall descend to his heirs.

8. Having now shown that the executor, after his assent to the legacy and delivery to the legatee, cannot recover, the question presents itself, who is entitled to have this property until Thomas Nixon arrives at the age of twenty-one years? I answer, that the executor or administrator of his mother, Mary Nixon. Mary Nixon has an estate for life, unless her son, Thomas Nixon, arrives at the age of twenty-one. If he shall arrive at the age of twenty-one, she has an estate until that time. This latter is vested, and upon no contingency. This is a term for years, if Thomas Nixon should live to be twenty-one. Thomas Nixon is still living, and not yet twenty-one. She has a vested interest in these slaves of a term for years, while Thomas Nixon is living; and her administrator can sue for, recover and hold this usufructuary interest bequeathed to her during the life of Thomas Nixon, and until he shall be twenty-one; at that time the property becomes his. This construction supports the will, and effectuates the intention of the testator;

it certainly was the intention of the testator, to part with the property in these slaves for the benefit of his daughter, and the slaves can never revert to his estate until the death of Thomas Nixon. During his life and until he attains the age of twenty-one, the term for years is in his mother, or her representatives: if he should die before that (if the bequest be contingent as to him) the question of reversion will arise; until that shall occur, before his arrival at twenty-one, it cannot occur.

J. W. LAPSLEY, *contra*:

The bequest to Thomas Nixon was executory, and creates a contingent estate dependent on his attaining the age of twenty-one years. The words "with this proviso: that if" &c., as used in this will, have a double effect: 1st, to limit Mrs. Nixon's life estate to the period when her son Thomas should arrive at the age of twenty-one, if both should live so long; and, 2nd, to create a contingent estate in said Thomas, dependent on his attaining the age of twenty-one. If the estate of Thomas is not contingent, it is impossible to conceive of a contingent estate; and if contingent, it cannot vest, of course, until the event happens on which it depends, viz., his living to the age of twenty-one. If it does not vest, it must, of course, revert to the estate of the testator, to be held by the executor subject to the happening of the contingency.—Fearne on Remainders, "Executory Devises," "Contingent Remainders," &c.; Marr v. McCullough, 6 Porter 507; Batesford v. Kibbell, 3 Vesey 363; Hanson v. Graham, 6 *ib.* 239; 5 *ib.* 582; 1 Jarman on Wills, pp. 771, 777, 301.

It is contended by the plaintiff in error, that the intervention of the particular estate in Mrs. Nixon changes the character of the bequest to Thomas, and makes it, though in terms contingent, a vested interest; and the case of Pearson v. Carter, 3 Murph. (N. C.) 321, is relied on to sustain this position. On examination of that case, it will be found totally different from this: there it was held, as a well established general rule, that even the word "when," standing alone, and applied to legacies, is a word of condition.

GOLDTHWAITE, J.—The will of the defendant's testator contains the following clause:

"I lend unto my daughter Mary Nixon the following negro slaves, viz., Peter, Esther, Michael, Armstead, and Little Fanny (Little Fanny she is not to have till the death of my wife), and one negro girl named Rose, during her natural life; with this proviso: that if her son, Thomas Nixon, now an infant, should live to be twenty-one years of age, I give unto him, the said Thomas Nixon, three of the negroes which I have loaned my daughter Mary, viz., Rose, Armstead and Michael, to him and his heirs forever; and after the death of my daughter Mary, the negroes I have loaned to her (for) her natural life, except the three I have given to my grandson Thomas Nixon, I give and bequeath (to) her children lawfully begotten of her body."

The main question in the case is, whether the legacy given to Thomas Nixon is vested or contingent. The gift is to Thomas Nixon, "*if*" he should live to be twenty-one years of age; and the rule is, that this expression, unless it is controlled by the context of the will, postpones the vesting of the legacy until the period at which it is payable; for until the event happens, that which is grounded upon it cannot take place (Brownsword v. Edwards, 2 Ves., Sr., 243, 248). But although this is the general rule, applicable to all conditional words, it must yield to the intention of the testator; and hence, although the words used are such as, if unexplained, would prevent the legacy from vesting immediately, yet, if from other parts of the will, it is apparent that such was not the intention of the testator, but that the words expressive of a condition were not used in that sense, but only to mark the time when the legacy was to be received, then the words must be construed to effectuate the intention.—Upon this principle it is well settled, that, although there be no gift of the legacy previous to the period appointed for its payment, yet, if the intermediate interest be given to the legatee, or to be used for his benefit, such circumstances will operate to vest the legacy; for the reason, that as the whole interest is given, either in one way or the other, for the benefit of the legatee, it could not have been the intention of the testator to have made the absolute interest in the legatee con-

tingent.—Fonerau v. Fonerau, 3 Atk. 645; Hoath v. Hoath, 2 Bro. C. C. 4; Parker v. Golding, 13 Sim. 418. So, also, when the intermediate interest is not bequeathed for the benefit of the legatee during minority, or until the fund is directed to be paid him, but such interest is bequeathed to another person beneficially till the legatee of the capital arrives at a particular age, and when he attains it the fund is directed to be paid to him; or, where the intermediate interest is given to another for life; as where the fund is bequeathed to, or in trust to, A for life, and after his death to B. In this class of cases, the person to whom the absolute property is limited, will take an immediate vested interest in the subject; such bequests being in the nature of remainders, and the interest of the first and subsequent takers vesting at the same time. This was the principle on which Boraston's case, 3 Co. 16, was decided; in which the devise was to Thomas Amory and wife for eight years, then to the executors till Hugh Boraston should accomplish the age of twenty-one years, and the mesne profits to be employed by the executor to the performance of the will, and then to Hugh Boraston and his heirs forever. The conditional words, "should accomplish the age of twenty-one years," were made to bend to the intent of the testator, gathered from the other parts of the will, which showed that the term of the executors was not to determine until the time when the remainder-man would have been of age, *had he lived*, and they were so construed; and then, as the particular estate was not determined by the death of the remainder-man, the estate in remainder vested immediately. This is the leading case; and the principles on which it rests, have since been generally acknowledged. These principles are:

1. That where conditional words are used in a will, which, if unexplained, would prevent the vesting of a legacy, such words will not be allowed to defeat the intention of the testator, that the legacy should vest immediately, when apparent from other portions of the will;

2. That where an absolute property is bequeathed to one, at a certain period *in futuro*, and the whole of the intermediate interest given to another, the legatee of the absolute property takes a vested interest.—Mansfield v. Duggard, 1

Eq. Cas. Abr. 195, pl. 4; Goodtitle v. Whitby, 1 Burr. 228; Lane v. Gouge, 9 Ves. 226, 231; Taylor v. Biddall, 2 Mod. 289; Johnson v. Baker, 3 Mur. 318.

It is obvious, that the case at bar does not fall within that class of cases, to which the last mentioned principle deducible from Boraston's case is applicable; the bequest of the intermediate interest not being to the daughter until Thomas Nixon shall arrive at twenty-one years of age. The gift is to her for life, provided Thomas Nixon does not live to be twenty-one; and if she dies before he arrives at that age, there is a gap between the intermediate interest and the legacy to Thomas Nixon; and upon the principles applicable to real estate, the latter would be void as a remainder. This distinguishes the present case from the case of Johnson v. Baker, *supra*, and the other cases cited by the appellant.—Our conclusion is, that the legacy to Thomas Nixon did not vest, until he arrived at the age of twenty-one years.

As the bequest to Thomas Nixon was contingent, it follows that the interest in the slaves during the interval between the determination of the life estate of Mary Nixon, and the happening of the contingency, upon which the legacy to Thomas Nixon was to vest, not being disposed of by the will, was an intestate interest, and was to be administered accordingly by the executor. The assent on his part to the legacy to Mary Nixon had no effect whatever, upon the bequest to Thomas Nixon, for the reason we have already assigned. Had there been a limitation over to him, by way of vested remainder, then the assent to the legatee of the intermediate estate, would have operated as an assent to the remainder-man. But this is not that case.

Judgment affirmed.

NOLES *vs.* THE STATE.

1. Where the accused may be convicted, under the indictment, of murder in the first degree, he is entitled to the number of peremptory challenges allowed in prosecutions for that offence; and it is, therefore, no objection to the form of indictment prescribed by the Code (p. 698), that it does not distinguish between the different degrees of murder.
2. The fifth article of the amendments to the constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury," does not restrict the States, in the prosecution of capital or infamous crimes, to the common law indictments. Those amendments were demanded by the States as safe-guards against encroachments on the part of the Federal Government, and were not designed to restrict their own powers.
3. The tenth and twelfth sections of the first article of our State constitution do not restrict the powers of the Legislature to enact laws defining offences and their punishment, and prescribing the forms of indictments suited to them, as well as the mode of trying them. If the form of indictment prescribed by the statute contains such an accusation, at the suit of the State, found to be true by the oaths of a grand jury, as furnishes to the accused reasonable information of what he is called on to answer, by setting forth the constituent elements of the offence, it will be sufficient, although it omits many averments which, at common law, were necessary to the validity of an indictment.
4. It was competent for the Legislature, by statute, to dispense with the averment, in an indictment for murder, that the offence was committed within the body of the county in which the indictment was found, and to require that fact to be shown by the evidence.
5. The caption of an indictment, showing when, where, and by whom the court was held, and who were elected and sworn as grand jurors, may be looked to, in aid of the indictment, as a part of the record.
6. A verdict *finding the prisoner guilty of murder in the first degree, and sentencing him to be hung*, is sufficient to authorize a judgment of conviction and sentence of death.
7. The date of the sentence and day of execution may be expressed in figures, instead of letters.
8. A justice of the peace has authority, in cases of emergency, to appoint a special constable (Code, § 712); and he must himself judge of such emergency.
9. A warrant, issued by a justice of the peace, if it shows on its face that the justice had no authority to issue it, is no protection to the officer executing it, but he may be treated as a trespasser.
10. An affidavit, by a married woman, that "she *is afraid* her husband will beat, wound, maim, or kill her, or do her some bodily hurt," is not sufficient to authorize the arrest of the husband (Code, §§ 3340, 3341); and if the warrant of the justice appears on its face to be predicated on such an affidavit, it is void, and furnishes no protection to the officer executing it.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

JOSEPH NOLES, the plaintiff in error, was indicted in the Circuit Court of Dallas, at its Spring term, 1853, for the murder of George Sharp. The indictment was in the form prescribed by the Code, on page 698. The prisoner demurred to the indictment, but his demurrer was overruled, and he then pleaded not guilty. The jury returned a verdict, saying, "they find the defendant guilty of murder in the first degree, and sentence him to be hung." The prisoner moved to set aside this verdict, but his motion was overruled; and he then moved in arrest of judgment, which motion was also overruled.

From the bill of exceptions, which was taken by the prisoner, it appears, that his wife made an affidavit before a justice of the peace, for the purpose of compelling him to keep the peace; that the said justice thereupon issued his warrant for the arrest of the prisoner, reciting therein, as the predicate of its issue, that Mary Noles, wife of Joseph Noles, had made affidavit before him, "that she is afraid that her husband will beat, wound, maim, or kill her, or do her some bodily hurt, and has therefore prayed surety of the peace against him," and appointed the deceased a special constable to execute it; that the prisoner, before the appointment of the special constable, had gone to the office of the justice, and demanded an investigation of the charge, which the justice had declined, saying that he could not hear the cause until the prisoner was in custody; that the prisoner had not left the town when the special constable was appointed, but there was no proof whether or not he knew of the appointment; that soon after the prisoner started out of town, in the direction of his home, the deceased started after him, and overtook him in the edge of the village, where the prisoner was engaged in an altercation with one Perry. The evidence was conflicting as to what occurred at this interview, but there was no evidence that the deceased, at this time, said anything to Noles about the warrant. About two o'clock, on the afternoon of the same day, the deceased, in company with three others, went to the prisoner's house, for the purpose of arresting him under the warrant, which the deceased had in his possession; but no arrest was then effected. Late in the after-

noon of the same day, the deceased again returned, in company with seven or eight other persons, to arrest the prisoner; the deceased carrying a gun with him. On approaching the prisoner's house, he came out to meet them, with a gun in his hands; and in the interview which then took place, he shot the deceased, killing him immediately. It is not deemed necessary to state, with particularity, the evidence as to what occurred on this occasion, as no question is here raised on it. It was not proved that the prisoner lived in the beat of the justice who issued the warrant, but his residence was in the county.

The court charged the jury, that the deceased had the right, under the warrant, to arrest the prisoner any where in the county; to which charge the prisoner excepted.

The prisoner asked the court to charge, that the appointment of the deceased as a special constable, unless there was an emergency for the appointment, was void, and he had no right to attempt to arrest the prisoner under it; which charge the court gave, but with this qualification: "that if there was no officer in the beat or neighborhood, that showed a sufficient emergency, or, at all events, the magistrate making the appointment must judge of the emergency." The prisoner excepted to the refusal to give the charge without the qualification, and also to the qualification given.

The prisoner also asked the court to charge, "that, if the warrant did not recite the substance of the complaint, it was a void process, and gave no right to arrest the prisoner; which charge the court gave, but stated that sufficient did appear on the face of the warrant to authorize an arrest;" and the prisoner excepted to the charge as given and as refused.

The prisoner also asked the court to charge, "that if an officer, in attempting to execute a process, does what the law does not authorize him to do, he is a trespasser, and the person charged is not bound to regard him as an officer, and may resist him; which charge the court refused to give, on the ground that it was abstract;" and the prisoner excepted to the refusal.

Geo. W. Gayle, with whom was Thomas Williams, for the plaintiff in error:

As to the Indictment.

There are various provisions of the Code of Alabama, which

bear more or less on the case. The statute creating the offence of murder in the first degree, of which the prisoner was convicted, is in the words and figures following, to-wit: "§3080. Every homicide perpetrated by poison, lying in wait, or by any other kind of wilful, deliberate, malicious, and premeditated killing, or which is committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery or burglary, is murder in the first degree; so, also, every homicide perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any human being, other than him who is killed, or perpetrate by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, although without any preconceived purpose to deprive of life any particular individual; any person guilty of murder in the first degree, on conviction, must *suffer death*, or imprisonment in the penitentiary for life, at the discretion of the jury trying the same." The statute creating murder in the second degree is in the words and figures following, to-wit: "§3081. Every homicide committed under such circumstances as constituted murder at the common law, and is not embraced by murder in the first degree, as defined in the preceding section, is murder in the second degree; and on conviction the offender must be imprisoned in the penitentiary for not less than ten years."—The statute in relation to the action of the jury upon the two above sections, is in the words and figures following, to-wit: "§3082. Upon any indictment for murder, the jury, finding the offender guilty, must ascertain by their verdict if it was murder in the first or second degree," &c. The solicitors of the State are not bound, in drawing indictments, to pursue the forms laid down in the Code, but they are required to make their indictments applicable to the offence charged. The statute on this subject is as follows: "§3503. The manner of stating the act constituting the offence, as set forth in the forms given in the appendix to the Code, is sufficient in all cases where the forms there given are applicable." The second branch of §3501 directs what an indictment shall contain, in the following words and figures: "2. A statement of the facts constituting the offence, in ordinary and concise language, without prolixity or repetition, and in such a manner as to enable a person of common understanding to know what is intended," &c. Another

important section of the Code which may bear on this case, is as follows: "§3504. All indictments for offences designated in this Code, which are offences at the common law, are good, if the offence is charged or described as at common law," &c. And, another in the following language, to wit: "§3515. The act or omission charged as the offence must be stated with that degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

1. Having presented the foregoing provisions of our Code, I will discuss the invalidity of the indictment, without reference to the constitutional objection to it, by three propositions: 1. Indictments for murder should be drawn upon the section of the Code defining murder in the first degree; 2. They should be drawn separately for murder in the first and second degree, as separately for murder and manslaughter at common law; 3. They should be drawn according to the forms of the common law. The indictment in question is not upon any statute, and follows no common law form; and I assume these propositions to show that if either can be maintained the indictment is invalid. Then, 1. Indictments for murder should be drawn upon the section of the Code defining murder in the first degree, including the terms "wilful, deliberate, malicious and premeditated"; because, 1, they would cover the inferior offence of murder in the second degree, as an indictment at common law covers and includes the offence of manslaughter; 2, if not so drawn, the jury would have no right to determine whether the prisoner was guilty of murder in the first, or second degree, as required by §3082 cited, because the indictment must support the verdict; 3, if not so drawn, the offence will not be so described as to enable the court to pronounce judgment upon conviction, as required by §3515, cited; 4, if not so drawn, it will not be "applicable," as required by §3503, cited; 5, if not so drawn, it will not be a statement of the facts constituting the offence, and in such a manner as to enable a person of common understanding to know what is intended," as required by §3501, br. 2. 2. They should be drawn separately for murder in the first and second degree, as the grand jury find the offence to be, because, in addition to the foregoing reasons, 1st, the judge cannot tell, at the opening of a cause, whether a prisoner is entitled to twenty-one or fifteen peremptory challenges. Murder

in the first degree is a capital offence, and one indicted for it is entitled to twenty-one peremptory challenges; murder in the second degree is punished, alone, by imprisonment in the penitentiary for not less than ten years.—As to challenges, see Code, §3581. 3. They should be drawn according to the forms of the common law, as authorized by §3504 of our Code.

2. Having disposed of the indictment without reference to the constitutional objections, I will now show that, in its present form, it violates the constitution of the United States, and of the State of Alabama. It violates these constitutions in not being drawn after the common law forms. The fifth article of amendments to the constitution of the United States, as far as applicable, reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury," &c. The tenth section of the bill of rights in the constitution of Alabama, as far as applicable, reads as follows: "In all criminal prosecutions, the accused has a right to be heard by himself and counsel; to demand the nature and cause of the accusation, and have a copy thereof; * * * and, in all criminal prosecutions, by indictment, or information, a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed," &c. The twelfth section of the same bill of rights, as far as applicable, reads as follows: "No person shall, for an indictable offence, be proceeded against criminally, by information," &c. One or more of these provisions is violated in not using the common law form; because, first, the word "indictment," used in them, refers to common law indictments, which, at the time of their adoption, had a technical form, and to which the wise men who framed them referred. What was an indictment then? in 1798, when the fifth article of the amendments to the constitution of the United States was adopted, and in 1819, when the constitution of Alabama was formed? It was "a bill or declaration of complaint drawn up in form of law, exhibited for some offence criminal or penal, and preferred to a grand jury."—3 Jacob's Law Dic. 401. The *lex scripta* is to be construed, in one respect, by the meaning of the language employed at the time of its enactment (Blakeney v. Blakeney, 6 Por. 109; Favers v. Glass, 22 Ala. 621; Foster v. Blount, 18 Ala. 687), and "the best way to expound a stat-

ute is to consider what answer the law-givers would probably have given to the question made, if proposed to them.—6 Jacob's Law Dic. 122. Suppose the two bodies of wise men who made the constitutions referred to, were assembled and asked, "when you used the word 'indictment' in your constitutions, what did you mean by it?" would not their answer be, "we meant an indictment according to the forms of the common law?"—But our own court has settled this question, so far as an adjudication in a civil cause can settle it. It is said that where the term "plea" is used in a statute, without any accompanying definition, it means a common law plea.—Mauldin v. Br. Bank at Mobile, 2 Ala. 505. Second, the common law form should be pursued, in order that the prisoner may know "the nature and cause of the accusation against him."—Bill of Rights § 10, *supra*; Murphy v. The State, 2 Cush. (Mi.) 590. Can the indictment in this case furnish the prisoner with "the nature and cause of the accusation?" There are, with us, two kinds of murder, differently punished, and the indictment is not upon either statute creating these offences, nor according to the forms of the common law. Could the prisoner, from the indictment, tell whether he was to be tried for an offence which would put him in the penitentiary for life or hang him, or for an offence punishable by imprisonment alone in the penitentiary for not less than ten years? Can the court tell from an inspection of that paper? The case of Murphy v. The State, cited above, was for the simple misdemeanor of trading with slaves; and for the same reason the Supreme Court of Mississippi declared an act of the Legislature of that State unconstitutional. If, for the reasons given, the indictment should be according to the common law form, let us see if the one in question is of such a character, and in what it differs. On comparison, it will be found defective in these particulars: first, it don't show that the grand jury were sworn; second, it don't state the offence was committed "with force and arms"; third, it don't state the offence was committed "in the county"; fourth, it don't use the words "feloniously or wilfully"; fifth, it don't show that the deceased "died of the wound"; sixth, it don't show he "died in the county." Then the indictment is invalid, and should have been quashed on demurrer, or motion in arrest of judgment.

3. But, if a departure from the common law form is allowed, then the indictment is defective (besides other reasons already given), in not showing, first, that the grand jury were sworn; second, that the offence was committed in the county in which he was tried; third, that the prisoner is a white man or negro. First, the grand jury are required by law to be sworn.—Code 462,–3, § 3. The indictment should show it, that the prisoner may know "the nature and cause of the accusation" against him, which he can alone get from the indictment. If it does not show they were sworn, he has no right to treat it as evidence of "the nature and cause of the accusation."—State v. Fields, Peck's (Tenn.) R. 140; State v. Hunter, *ib.* 166. Second, the offence should be shown by the indictment to have been commited in the county. True, the 3514 § of the Code declares it unnecessary. That section reads: "It is not necessary for the indictment to allege where the offence was committed, but the proof must show it to have been within the jurisdiction of the county in which the indictment is preferred." But this statute is supposed to be unconstitutional, and to violate the tenth section of the bill of rights, in two respects: first, the prisoner has a right to demand "the nature and cause of the accusation against him, and have a copy thereof." When furnished with a copy of the indictment, he is not informed by it whether he has killed a man in Mississippi, Georgia, or Alabama, and does not know how to prepare his defence, or where to send for witnesses. And every person is presumed to be innocent, until his guilt is made to appear.—Murphy v. The State, 2 Cush. 590. Second, the prisoner has a right to "a speedy public trial by an impartial jury of the county or district in which the offence shalll have been committed." If a prisoner has to be put on his trial as the Code requires, and wait for proof of jurisdiction, he may never have "a speedy trial." Suppose a grand jury in Dallas were to find a bill for a homicide committed in Madison, and this was ascertained after the trial was commenced "by proof"; the prisoner, as a consequence, after much expense, would be sent to Madison. Would this delay be giving him "a speedy trial"? Besides, the discovery of a want of jurisdiction, after the jury were empannelled, and cause submitted, would amount to the prisoner's acquittal.—Ned v. State, 7 Port. 187. Third, the indictment should show that

the prisoner was a white man or slave. Upon this subject our statutes are perfectly silent. They do not require an indictment against a slave to state that he is a slave. Now, suppose every indictment for murder follows the form of the one in this case (and it is the only form found in the Code), how is the court to know whether the prisoner is a white man or slave, so as to try him by the law applicable to his condition? It is impossible that this can be done. First, the court cannot say whether the jury shall consist of two-thirds slave-holders; second, the court cannot determine the number of challenges; a white man being entitled to 21 and 15, and a slave to 12 (Code § 3319); third, the jury cannot tell whether to find the prisoner guilty of murder in the first or second degree, and if the first, whether to hang him or put him in the penitentiary for life; fourth, the judge cannot tell whether to sentence him to be hung, or send him to the penitentiary. Neither the judge nor the jury can determine this from an inspection of the prisoner, but from the indictment alone.

4. The indictment does not support the verdict of the jury. The form of a verdict is, "We, the jury, find the prisoner guilty in manner and form as charged in the indictment. Now, first, this indictment not being drawn upon the provision of the Code creating murder in the first degree, nor according to the forms of the common law, cannot support the verdict, because it does not charge the prisoner with murder in the first degree; second, it is uncertain, and not such an indictment as the statutes cited require (Code, § § 3515; 3501, br. 2); third, there being murder in the first and second degree, "the statement of the facts are not in such a manner as to enable one of common understanding to know what is intended."—Code § 3501, br. 2. The forms laid down by the Code are good only when "applicable."—*Ib.* § 3503.

As to the Verdict and Judgment.

The verdict rendered in this case is in the following words: "We, the jury, find the prisoner guilty of murder in the first degree, and sentence him to be hung." This verdict was never changed, or put in form, but stands in this language upon the minutes of the court.

1. No judgment can be rendered on this verdict. Suppose the jury had said "we find the prisoner guilty of murder in the

first degree," and said no more; no judgment could be rendered, because they would not have exercised their discretion as to hanging, or imprisonment for life. Or, suppose they had found the same verdict, and added: "we sentence him to be whipped"; no judgment could be rendered, because the same discretion of the jury had not been exercised, The addition to the verdict in this case,—"we sentence him to be hung,"—is as ridiculous as though the jury had said, "we sentence him to be whipped." The addition to the finding is unwarranted by law, and leaves the discretion of the jury unexercised. The verdict should have been in the language of the statute, thus: "We, the jury, find the prisoner guilty of murder in the first degree, and further find that he must suffer death"; leaving it to the court to direct the manner of his death according to law.

2. The judgment of the court must follow the verdict, and it is for this reason that verdicts are allowed to be put in form.—See 2 Hawk. P. C. 662, § 9, n. 2. The court can, therefore, only sentence the prisoner to be hung, but cannot say how, or in what manner, or it departs from the verdict, and presumes what the jury intended. In criminal cases nothing can be taken by intendment.—Wharton's Am. Cr. L. 92. If the judgment merely follows the verdict, the judgment never can be executed, because the sheriff cannot know how to hang the prisoner,—whether by the arms, legs, neck, or other important member.

3. The jury, by their verdict, usurped the powers of the court, as to the right of judgment, or sentence. It is the court's duty to sentence prisoners, and not the jury.—Code, § 3638.

4. But there are two sentences in the record, materially differing—the sentence of the jury, and the sentence of the court. The first is that the prisoner be hung, fixing no time for the execution; the other that he be hung by the neck, on a certain day. By which sentence must the sheriff be governed? If this case is not reversed, it may be necessary to apply for a writ of prohibition to stop the execution of the sentence by the judge; for I insist that the sentence of the jury being first should be followed, and, regarding the humanity of the law, the prisoner be hung by the legs for the usual length of time; the sentence of the jury being silent as to the mode and manner of hanging.

5. The judgment or sentence of the court is fatally defective in describing the day of the sentence, and the day of the execution. The first was on the 31st May, 1854, and the latter is to be, perhaps, on tne 11th August of the same year. The fatal defect in it is, in putting these periods in figures, and not in letters. In the case of The State v. Raiford, 7 Porter 101, Judge Ormond admits this to be the common law, and overruling it, says: "At all events it would savor of unnecessary refinement to sustain such an objection now." Now, what right had the Supreme Court of Alabama, in Judge Ormond's day, or through Judge Ormond, to alter or change the common law? The Legislature is the law-making power, and not the Supreme Court; and the Legislature, in this respect, has not altered the common law, and it is as much in force among us as our statutes are. Upon this subject, the common law says: "Figures are numerals. They are either Roman, made with letters of the alphabet, for example, MDCCLXXVI; or they are Arabic, as follows, 1776. Roman figures may be used in contracts and law proceedings, and they will be held valid; but Arabic figures, probably owing to the ease with which they may be counterfeited, have been held not to be sufficient to express the sum due on a contract, and indictments have been set aside because the day or year were expressed in figures.—Bouvier's L. D. vol. 1, 409, Tit. "Figures," and authorities there cited. If it is a defect in an indictment to give dates in figures, it is more so to give them in that way in the solemn sentence of death.

As to the Bill of Exceptons.

1. The court below erred in charging that the deceased had a right to arrest the prisoner out of the magistrate's beat in which he was appointed, and any where in the county. The warrant was for no offence, but for an expected misdemeanor.—Roscoe's Cr. Ev. (2 Eng. ed.) top page 695. One constable is elected for each precinct, like a sheriff for a county.—Code § 715. A constable vacates his office by removal from the beat, and is liable to a penalty for acting after removal.—Code § 720. The same rules which govern a sheriff as to his county, govern a constable in his beat, or precinct.—Pixley v. Butts, 2 Cow. 421. A warrant for a misdemeanor and a civil process stand on the same footing, and a sheriff cannot go

out of his county to levy civil process.—Allen on Sh'ffs, 14; 3 U. S. D. 440, § 315; 2 Sup. U. S. D. 767, § 13.

2. The court erred in refusing, without qualification, to give the charge asked, "that unless there was an emergency to appoint the deceased a special constable, his appointment was void, and he had no right to arrest Noles under it."—Code § 712, br. 3; Clay's Dig. 364, §§ 6, 8. A peace warrant can be executed by any executive officer in the county.—Code § 3385.

3. The court erred in the qualification of the last above charge, "that if there was no officer in the beat or neighborhood, that showed a sufficient emergency; or, that at all events the magistrate making the appointment must judge of the emergency." 1. When there is no officer in the beat, the magistrate may appoint one, and he is a different officer from one appointed in cases of emergency.—Clay's Digest 364, §§ 6, 8. 2. There being no constable in the beat created no emergency, because there had been none there for years; and, besides, the magistrate had power to appoint a regular constable.—Clay's Digest 364, §§ 6, 8. And there were constables in adjoining beats, and a sheriff and deputies in the county. 3. There was no emergency, because the prisoner went before the magistrate, and demanded an investigation. 4. What does emergency mean? In its common acceptation, it means "pressing necessity." Was there this necessity to have the prisoner arrested, when he was within the jurisdiction of the court, and demanded an investigation?

4. The court erred in refusing to charge "that if the warrant did not recite the substance of the complaint, it was a void process, and gave no authority to arrest Noles." The warrant did not recite the substance of the complaint, if the complaint is a legal one. It simply says, affiant "is afraid that her husband, Joseph Noles, will beat, wound, maim, or kill her, or will do her some bodily hurt." The magistrate had no right to issue the warrant, unless affiant had sworn that Noles had threatened her, or was about to commit an offence on her person. Neither oath she took.—Code, §§ 3340, 3341; Clay's Dig. 446, § 4. If the warrant recites the complaint, then the magistrate had no right to issue it, because the complaint, as recited, is unauthorized by law. Being "afraid" of personal violence,

does not, alone, justify binding one over to the peace. The process must be legal to justify an officer, and its legality depends on its conformity to law.—Roscoe's Cr. Ev. (2 Eng. ed.) 697. And it must be from a court having jurisdiction.

5. The court erred in the qualification given to the next above charge asked, "that sufficient appeared on the face of the warrant to authorize an arrest." Compare the warrant with the law, and it will be found there is nothing in it to justify an arrest, much less the issuing of the warrant.—Clay's Digest 446, § 4; Code, § 3341.

6. The court erred in refusing to charge, as asked, "that if an officer, in attempting to execute a process, does what the law does not authorize him to do, he is a trespasser, and the prisoner is not bound to regard him as an officer, and may resist him." This charge the court refused to give, because it was said to be abstract. It was not abstract: 1. Because the warrant was for less than a misdemeanor, and the officer and his *posse* had no right to advance when forbidden, and to attempt to kill the prisoner on resistance.—Roscoe's Cr. Ev. (2 Eng. ed.) top page 702; Middleton v. Holmes, 3 Porter 424. 2. Because the special officer never made known his official character to the prisoner.—Roscoe's Cr. Ev. (2 Eng. ed.) top page 701, 702.

P. T. Sayre, for the Attorney General, with whom was J. H. Campbell, *contra :*

Under the constitutions of this State and the United States it is contended, four things must exist, to render any criminal trial legal, viz., 1, an indictment; 2, the offence must have been ascertained by law; 3, the accusation must be in the form prescribed by law; 4, the accused must be informed of the nature and cause of his accusation. It is contended that the term indictment, signifies a "common law" indictment.—What, then, is a common law indictment? An indictment, says Archbold, "is an accusation at the suit of the crown, found to be true by the oaths of a grand jury."—1 Archbold's Cr. Plead. 632; 1 Chitty's Cr. Law 168; 4 Black. Com. 302; Code § 3497.

What allegations are necessary, to give it the character of an accusation? 1. It must be upon the oath of a grand jury.

2. It must contain a certain description of the alleged crime and a statement of the facts which constitute it, lest the grand jury should find a bill for one offence, and the defendant be tried for another (1 Chitty's Cr. Law 169); and, in order also that the accused may know what crime he is called upon to answer, 3rd, the offence must be so charged, that every one may understand it, alleging all the essential requisites of the offence.—1 Chitty's Cr. Law 172. 4. The offence must be positively charged, and be in English.

These are the chief and grand requisites of the common law accusation. The indictment in this case, will be found to contain them all. 1. It states the court, and county, and time of finding the indictment. 2. It appears to be the accusation of a grand jury of Dallas. 3. It alleges that "Joseph Noles, on the 14th of February, 1853, unlawfully, and with malice aforethought, killed Goorge T. Sharp, by shooting him with a gun, against the peace and dignity of the State of Alabama." Murder is the unlawful killing of any one, with malice aforethought, either express or implied. From this indictment, you could frame the above definition of murder. The accused is advised by it, that a grand jury of Dallas County has charged him with an offence, and that the offence is the murder of Geo. T. Sharp. There is no danger, upon this indictment, that the defendant would be tried for some other offence, or that he would not know what he was called on to answer. This indictment, therefore, contains all the great features of a common law indictment.

But it is objected, that the word indictment means a common law indictment, in every particular; and that if this indictment does not contain every allegation, that was usual in common law indictments, at the time of the adoption of the constitution, it is no indictment. This cannot be the case, until it is shown, that there were, at common law, fixed forms, which could not be varied or changed. 1. There were no forms of indictment established by any tribunal known to the common law. 2. The forms which were used in England, were framed by different individuals, and were of no authority, except when sustained by the decisions of the courts. 3. The common law only required, that the accusation should be based upon the principles above stated. The forms of indictment in England have been contin-

ually undergoing changes, both in language and allegations.—In England, New York and Massachusetts, forms of indictments have been changed.—Wharton's Cr. Law 612.

The particular objections to the indictments cannot be sustained. The minutes of the court sufficiently show that the grand jury was sworn (State v. Murphy, 9 Port. 487); and it is not necessary that their names, or that they were sworn, should appear in the body of the indictment. The term "grand jury" is technical, and "*ex vi termini*" implies the proper qualifications.

The words "force and arms" are no part of the offence for which the defendant was indicted. They are mere words of formality, that could by no possibility have added anything to the force of the indictment. New York, Massachusetts and Alabama have declared them unnecessary.—Wharton's Cr. Law 62; Code, § 3501.

There is no reason why the name of the county in which the offence was committed should be stated; it forms no part of the offence of murder—an offence might be committed in one county and punished in another, but for the constitution.—1 Chitty's Cr. Law 183. The words "feloniously and wilfully" are not necessary to advise the party that he is charged with murder. They are not even used, in the elementary works, as descriptive of the offence. "Unlawfully and with malice aforethought," are certainly terms of as strong descriptive power as "feloniously and wilfully." They are mere words, intended to be only description, and constitute no more elements of the offence, than do the words "force and arms," and "contrary to the statute." It might just as well be contended, that in indictments, the spelling of Henry VIII must be used, and that there could be no court, unless the judges wore wigs and gowns.—Barb. Cr. Law 333.

If the constitution of the United States, by the word indictment, means a common law indictment, in every word and letter, it is certainly at war with the provisions of the constitution of this State. Instead of "indictment," our constitution uses the words "according to the forms which the same has prescribed." From this clause, it is clearly inferable, that the State has the power to pass laws prescribing forms, by which criminal prosecutions shall be conducted. But, to put this beyond all ques-

tion, the 19th section of the 6th article of the constitution of Alabama, declares, "that it shall be the duty of the General Assembly, as soon as circumstances will permit, to form a penal code." The 20th section of the same article prescribes "that within five years after the adoption of the constitution, the body of our laws, civil and criminal, shall be revised, digested," &c. This has been done; and this party has been indicted according to the forms prescribed by law.

But even if the indictment is not a good common law indictment, it is good because the laws of Alabama say it is good.—The articles of the constitution of the United States, relied upon, have no applicability to the administration of the criminal law of the State; they refer only to the administration of the criminal laws of the United States. It would be a strange anomaly, if the State had the right to define and create offences, to change, modify and increase punishments, and yet have no power to change the particular forms in which accusations should be made. Upon that principle, no indictment for a statutory offence would be good, unless it conformed to the common law form, or unless the offence existed at common law. But the Legislature has the right to change the common law, and to change the statute laws of the State. And it is a general rule of law, that the common law shall only remain in force, until it is altered or repealed by the law-making power. At the time of the making of our constitution, if the common law proceedings were in existence, then they were the forms to be observed in criminal prosecutions. It would be strange, indeed, if for all time to come, no other forms of indictment should be good except those which have been furnished by the common law. The proposition that any sovereignty has the power of establishing its own system of laws, seems to be too plain for argument, and the right has been constantly exercised. To say that any other power can supervise or establish the internal laws of a State, would be a direct violation of its sovereignty.—The people of Alabama, in their sovereign capacity, could abolish trial by jury, and the grand jury itself; and in this State, the Legislature has passed laws for the punishment of crimes, without the interposition of a grand jury.—Code §§ 3316, 3324. The "forms of law" required by our constitution have been followed. A grand jury has presented a sworn accusation. The

accused has been tried by a competent court, and convicted by a petit jury.

The Code provides, that the grand jury shall not determine the degree of murder of which the party is accused; that duty is imposed upon the jury trying the offender (Code § 3082); and such has been the practice in this State and Tennessee.—16 Ala. 781.

The verdict is a substantial compliance with the law. The word "hung" is a technical term, and, when used in the connection presented in the record, means suffer death. It is sufficient if the jury find all the essential requisites of the charge.—1 Chit. Crim. Law 644. The court will not disturb a verdict on account of any defect in its form, provided the intention of the jury is unequivocal and evident.—1 Morris (Iowa) 52; *ib.* 18. And the verdict may be amended, even in a criminal case (1 Chit. Crim. Law 646; 1 Morris 13); and upon appeal.—18 Vermont 180.

CHILTON, C. J.—The indictment in this case pursues the form prescribed by section 3080 of the Code, and reads as follows:

"THE STATE OF ALABAMA, }
Dallas County. } The grand jury of said Dallas County charge, that on the fourteenth day of February, 1853, Joseph Noles, unlawfully, and with malice aforethought, killed George T. Sharp, by shooting him with a gun, against the peace and dignity of the State of Alabama.

(Signed) J. A. STALLWORTH,
Solicitor for the Second Judicial Circuit of Ala."

Many objections are made to it, which we shall notice in the order in which they are presented by the prisoner's counsel.

1. As to the several objections, that the indictment does not distinguish between murder in the first and second degrees, as defined by the Code, and does not, according to the rules of the common law, sufficiently set forth the facts and circumstances of the alleged homicide to make it good as an indictment for murder in the first degree, we need only say, that the form pursued being that prescribed by the Code, the objections cannot be valid, if the Legislature had power to enact that the form should be a good indictment. The Code must be

regarded as a system or body of laws, and must be so construed that its provisions may harmonize with each other, unless they are clearly repugnant. There is no repugnance here. Form No. 2, on page 698, is prescribed as the indictment for the offence defined by section 3502, and the jury are to determine whether the proof makes the offence murder in the first or second degree, as they determined, at the common law, whether the offence was murder or manslaughter. As the greater includes the less offence, there is certainly nothing anomalous in finding a prisoner guilty of the less, upon an indictment for the greater. The objection that the party is not advised as to the number of peremptory challenges to which he is entitled, cannot properly be urged, for the reason that, in every case where he may be convicted of the higher offence, he is entitled to the number of challenges allowed in prosecutions for that offence.—*Ex parte* McCrary, 22 Ala. 65.

If the form of the indictment specially pointed out by the Code to be pursued in prosecutions of this kind, did not, in every particular, correspond with the general law defining the nature, and pointing out the requisites generally, of indictments, the well established rule of construction, which requires that even as to pensl statutes we should carry out the obvious intent of the Legislature, to be gathered from the words of the law (Smith's Com. on St. pp. 834 to 878), would require us to exempt the particular form without the influence of the general statute, as a legislative exception; otherwise the provisions would be suicidal. But we are satisfied that no such repugnance exists in the case before us; on the contrary, the form pursued is in harmony with the other provisions of the Code.

We come now to consider the sufficiency of the indictment with reference to the Federal and State constitutions. Had the Legislature the power to make this a valid indictment, and to require the jury to find by their verdict whether the offence was murder in the first or second degree; and within certain prescribed limits, to exercise a discretion as to the penalty to be inflicted on conviction?

It is insisted by counsel, that the fifth article of the amendments to the constitution of the United States, which provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a

grand jury," &c., is an inhibition upon the States, restricting them in the prosecution of capital or infamous offences to the *common law* indictment; and that, inasmuch as the indictment before us is manifestly defective as a common law indictment; it cannot be supported, and the statute prescribing it is unconstitutional and void. It is further contended, that it is violative of the tenth and twelfth sections of the bill of rights of this State; the first declaring, that "in all criminal prosecutions, the accused has a right to be heard by himself and counsel, to demand the nature and cause of the accusation, and have a copy thereof," &c.; and further, that "in all criminal prosecutions, by indictment or information, a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed," &c.; and the twelfth section providing, that "no person shall, for any indictable offence, be proceeded against criminally by information."

It is needless to inquire whether the provisions of the Code sanctioning this indictment may consist with the 5th article of the amendments to the Federal constitution; for the reason, that these amendments were never designed to operate upon the States, as restrictive of their powers, but were demanded by the States as safe-guards against encroachments on the part of the Federal Government. The history of the country informs us, that the resolutions proposing these amendments were offered by Mr. Madison, to meet objections made by some of the State conventions, to the unrestricted powers conferred upon the General Government by the constitution as it then stood, in regard to certain subjects-matter of legislation. The preamble of the resolutions, as they passed Congress, may serve to strengthen this conclusion. It declares: "The conventions of a number of the States having, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and, as extending the grounds of public confidence in the government, will best insure the beneficent ends of its institution: *Resolved*," &c., "that the following articles be proposed," &c. The States, as independent sovereignties, could certainly have protected their own citizens, by their fundamental laws, from the effects of improper legislation by their legislative assemblies; but as the citizens of all

the States were to be amenable to the laws of the General Government, when passed in conformity to the powers conferred by the Federal constitution, over which laws the States, as such, possessed no power, it was deemed essential to the security of the citizens, and to the rights of the States, to place further restrictions upon the powers of the Federal Government, as the same is provided for in these amendments. But we are not left to reason and the history of the country alone to sustain our view. The authority of adjudged cases abundantly sanctions it.—Jackson v. Wood, 2 Cow. Rep. 818, n. b; Livingston v. The Mayor of New York, 8 Wend. 100; Barron v. The Mayor and City Council of Baltimore, 7 Peters' Rep. 247, *per* C. J. Marshall. Indeed, the point has been expressly so ruled by this court, in Boring *et al.* v. Williams, 17 Ala. 510.

So much for the provision of the Federal constitution.

With respect to the legislative power of the State, we have frequently announced that in reference to all legitimate subjects-matter of legislation, this power was unlimited, except in so far as it was restrained by the Federal or State constitutions (Stein v. The Mayor and Aldermen of the City of Mobile, at the present term; *Ex parte* Pickett, 24 Ala. 96); while the Federal Government can rightfully exercise no power save such as is expressly delegated by the constitution of that government, and such as is necessary and proper to carry into execution some express power.

Having seen that the Federal constitution does not in any wise restrict the State in the exercise of its legislative functions, in prescribing the forms of the indictments and the mode of criminal trials, let us next consider what influence our own bill of rights has upon the subject.

The twelfth section of the bill of rights evidently inhibits the Legislature from passing any law authorizing a party to be proceeded against criminally by information, for an indictable offence; but this in no wise restrictsthe Legislature from enacting laws defining offences and their punishment, and prescribing forms of indictments suited to them, as well as the mode of trying them. They cannot say a party may be proceeded against for an indictable offence by information—that is, they have no power to say a party can be put upon his trial for an

offence which is indictable, unless the accusation brought against him is made upon the oath of a grand jury.

We readily concede, that to give effect to the spirit and meaning of this clause, there must, in all prosecutions for indictable offences, be such an accusation at the suit of the State, found to be true by the oaths of a grand jury, as shall furnish to the accused reasonable information of what he is called upon to answer, by setting forth the constituent elements of the offence or crime with which he is attempted to be charged. It would not be competent for the Legislature to make that an indictment which failed to accuse a party of a crime. Regard must be had to the nature of the accusation, as embodying and setting forth with reasonable certainty a charge of the crime for which the prisoner is to be tried. An indictment for larceny could not, by legislative enactment, be made an indictment for murder, without violating the true spirit and meaning of this provision in the bill of rights; but if the indictment set forth, with reasonable certainty, the crime for which the accused is to be tried, as the Legislature may alter the common law, it may declare such indictment to be good, notwithstanding it may fail to contain many averments required by the common law to make it valid. There must be an indictment, before a party can be put on his trial for an indictable offence. In other words, there must be "a written accusation of the party, at the suit of the State, of a crime, presented upon oath by a jury of twelve or more men, called a grand jury."—Archb. Cr. Pl. (6 ed.) vol. 1, p. 63, and notes.

In the case before us, there is an indictment accusing the prisoner on the oath of a grand jury, that on a named day, he "unlawfully and with malice aforethought, killed George T. Sharp, against the peace," &c. Now, although this indictment would not be good at the common law, because it is wanting in certain formalities which were required by the rules of that law; yet it is certainly an indictment—that is, it is a "written accusation of a crime against the prisoner, found by a grand jury;" and it is a compliance, in our opinion, with the spirit of our fundamental law. This being the accusation, when the prisoner is arraigned for trial, he is entitled to demand the nature and cause of it, and to have a copy of it, in order to enable him to examine it by himself and counsel, so as to test its legal suffi-

ciency by demurrer, or prepare to defend against the charge on the facts. This is all that is meant by the clause in the bill of rights, by which the accused, in criminal prosecutions, has a right to demand the nature and cause of the accusation against him. The charge is not to be concealed from him, but he is entitled to be fully advised as to what the accusation is against him, that he may prepare to meet it. This clause has no bearing upon the question, as to what shall be the form of the accusation, but entitles the prisoner to demand its nature, whether it be good or bad: he has the right, upon his arraignment, to have the indictment read to him: he is thus advised of the nature and cause of it: he has the further right to "*have a copy thereof.*"—10th Sec. Bill of Rights.

Upon the whole, we are satisfied that the Legislature has the power to make this a good indictment for murder in the first degree, as well as for murder in the second degree; leaving it to the jury to find the degree, and to affix the punishment, within certain restrictions as prescribed by the Code. England, as well as most of the States of this Union, has passed laws simplifying the forms of indictments, and curtailing them of much useless verbiage.

We must then go to our statutes, and not to the common law, to test the sufficiency of this indictment, and tested by these, there is no question as to its sufficiency.

It is not pretended that the prisoner was tried out of the county in which the offence was committed. It was competent for the Legislature to enact that it should not be necessary to allege where the offence was committed, but that the proof must show it to have been within the jurisdiction of the county in which the indictment was preferred.—Code § 3514. The accusation of the commission of the crime, is the *gravamen* of the indictment. This cannot be dispensed with; but the particulars, as to time, place, and circumstance, not constituting essential elements in the crime, may be dispensed with in the indictment by the statute, and be left as matter of proof, as establishing or not the jurisdiction of the court. We can see no inconvenience or injury, which could result to the accused, from this, as the statute now secures to him a trial in the county where the offence was committed, unless upon his motion it is taken to another county on change of venue.

As to the objection, that the indictment fails to show that the grand jury were sworn, we have only to say, that we have frequently decided that the caption of the indictment, showing when, and where, and by whom the court was held, and who were selected and sworn as grand jurors, must be looked to in aid of the indictment, as forming a part of the record, and need not be repeated in the body of the indictment. Reeves v. The State, 20 Ala. 33; State v. Murphy, 9 Porter 487; State v. Morgan, 19 Ala. 556.

As to the verdict and judgment: The jury find the prisoner "guilty of murder in the first degree," and say they "sentence him to be hung." This verdict is sufficient, as it conforms to the Code (§ 3082), except as to the verbiage used in the conclusion. The Code (§ 3080) provides, that the prisoner, being found guilty of murder in the first degree, *shall suffer* death, or imprisonment for life, at the discretion of the jury trying the same. Here the jury do not say, in so many words, he shall suffer death, but that he shall be hung. This finding is unequivocal. The term "hung," or "sentencing a man to be hung," found in this collocation, means to suspend him by the neck until he is dead.—1 Bouv. Law Dictionary, Title "Hanging"; Web. Dic.

That the jury say they "sentence" him to be hung, is no objection. It is not the most appropriate word perhaps; but they evidently mean, that, in their discretion, they affix to the crime of which they convict him the punishment of death. Any other construction would be altogether hypercritical, and cannot be indulged. The end of the statute is attained, when the jury, by unequivocal terms, certify to the court the punishment they have affixed; and their verdict must not be too rigidly construed, but according to the plain, common-sense meaning of the terms they use, as understood in the community.—Nabors v. The State, 6 Ala. 200; 1 Chit. Crim. Law 644,-6, and notes; State v. Upton, 1 Dev. 513. It is sufficient, if their meaning is obvious and unmistakeable, although they may not couch their verdict in technical language.

The objection to the sentence of the court, that the dates of such sentence and the day fixed for execution thereof are expressed by figures, cannot be sustained. In modern times, this has been held to be sufficient, even in the indictment, if the date

is plainly legible.—5 Bacon's Abr., by Bouv., 81; State v. Hodgeden, 3 Verm. 481; State v. Raiford, 7 Por. 701.

We come next to consider the questions raised upon the bill of exceptions taken in the case.

When the office of constable is vacant in a justice's precinct, or in cases of emergency, the justice has power to appoint a person to act in his place, without requiring bond and security; and such appointment extends to the execution of all process, except the collection of money on executions. The justice is the proper judge of the emergency requiring such appointment; and when one has thus been appointed for the execution of a warrant, there can be no doubt of his authority to do so any where in the county of the justice's residence.—Code § 711.

The court below, by an affirmative charge, and which we cannot intend was abstract, affirmed the validity of the warrant under which the deceased was proceeding to make the arrest when killed by the prisoner. If the warrant was invalid upon its face, and showed that the justice had no jurisdiction of the matter involved in it, then, as it would be void, and as the officer in whose hands it was placed for execution must be presumed to know the law, and could see that it was void, he was a trespasser. Although there is much uncertainty and contrariety of opinion in the books, as to when an executive officer shall be protected by virtue of process placed in their hands, yet, we believe, they are all agreed in this: "that a constable cannot justify any arrest by force of a warrant from a justice of the peace, which expressly appears, upon the face of it, to be for an offence whereof the justice of the peace hath no jurisdiction," &c. I quote the language of Serjeant Hawkins (Pleas, vol. 2, p. 130, § 10), who says that this seems clear.

If, then, it appears upon the face of this warrant that the justice had no jurisdiction to order the arrest of the prisoner, the deceased, in his attempt to execute it, might be regarded by the prisoner as a trespasser, as soon as he entered his premises, and might be treated as such. This is the law, as clearly announced in Duckworth v. Johnson, 7 Ala. 578; Sasnett v. Weathers, 21 *ib.* 673; and Crumpton v. Newman, 12 *ib.* 199. How far the prisoner might lawfully go in resisting the deceased, conceding that the latter was a tres-

passer, is fully discussed in Carroll v. The State, 23 Ala. 28, and need not now be more particularly adverted to.

Is the warrant in this case void upon its face? Does it show, upon its face, that the justice had no jurisdiction of the complaint, the substance of which the law requires should be stated in it?—Code § 3341. Upon our first examination, we thought it was not void, but informal merely.—Upon having our attention more particularly called to it, by the counsel for the prisoner, we are fully satisfied that our first impression was wrong, and that it is wholly void.

The Code (§ 3340) declares, that, "Whenever complaint is made to a magistrate, that any person has threatened, or is about to commit an offence on the person or property of another, he must examine the complainant, and any witness he may produce, on oath, reduce such examination to writing, and cause it to be subscribed by the parties so examined." Section 3341 declares, "If, on such examination, it appears that there is reason to fear the commission of any such offence, by the person complained of, the magistrate must issue a warrant, directed to any lawful officer of the State, containing the substance of the complaint, and commanding such officer forthwith to arrest the person complained of, and bring him before him, or some other magistrate having jurisdiction in the matter."

The warrant in this case appears, upon its face, to be predicated upon the affidavit of Mary Noles, wife of the prisoner, which merely states that she "is *afraid* that her husband, Joseph Noles, of said county, laborer, will beat, wound, maim or kill her, or do her some bodily hurt." It sets forth no other cause of complaint, than in the recital of this oath, and proceeds "these are therefore to command you," &c.

This statute, being in restraint of liberty, and penal, must be strictly construed; that is, it may not be enlarged, by construction, beyond the plain import of the terms in which it is couched.

According to it, two cases only exist, where sureties for the peace may be demanded by the complaint of a party: one is, where any person "has threatened" to commit an offence on the person or property of another; the other, where such person "is about to commit" such offence.

This warrant embraces neither, but merely that the prisoner's wife "is afraid" he will commit such offence. This is a substantive and distinct ground, not embraced by the statute; and for the obvious reason, that we should have but little security for personal liberty, if the mere fears of others, however groundless, could deprive us of it.

We are aware, that this looks like a technical ground upon which to reverse a cause of this grave importance; but it is our duty to decide the law, irrespective of consequences; and being satisfied that the warrant is void, we have no alternative but to reverse the sentence, and remand the cause, that the prisoner may be again tried.

This judgment will be accordingly here rendered, and the prisoner will remain in custody to await his further trial.

BOYKIN *vs.* KERNOCHAN.

1. A final decree of the Chancery Court, which has been fully executed, cannot be opened on the petition of one who, by his own showing, had no interest whatever in the subject-matter of the controversy until long after it was terminated.
2. When a party propounds his interest by petition to the court, praying to be made a party to a suit that he may prosecute an appeal or writ of error from the final decree, the order making him a party would relate back to the time when the decree was rendered; and therefore, if his petition shows that an appeal or writ of error from the decree is already barred by the statute of limitations, it will not be granted. This rule applies equally to Chancery Courts and Courts of Probate.
3. The limitation prescribed to writs of error by the act of 1818 (Clay's Digest 309 § 17), applies to final decrees in chancery, as well as to final judgments at law.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. WADE KEYES.

THE appellant filed his petition on the 14th April, 1854, in the Mobile Chancery Court, setting out that on the —— day

of ———, 1852, he intermarried with Sarah M. Hazzard, who had been a party to a suit in said court, in which Joseph Kernochan was complainant, and Robert F. Hazzard and Sarah M., his wife, and others, were defendants; that the object of the suit was to foreclose a mortgage on certain lands, the fee of which was in his wife; that during his marriage his wife had issue, born alive, capable of inheriting; that both the issue so born, and his wife, are now dead; that he is entitled to his curtesy, and prays to be made a party to the record in the former suit, that he may prosecute an appeal or writ of error from the decree, which he avers to be erroneous. Before either his marriage, or the filing of the petition, a final decree had been rendered in the mortgage suit, and that decree had been fully executed. Three years had also elapsed between the rendition of the decree and the filing of the petition.

The Chancellor dismissed the petition, and this appeal is prosecuted in order to review this order of dismissal:

John T. Taylor, for the appellant, contended:

1. That the only question in the case, is, whether the petitioner has shown such an interest in the litigation, as warrants his being made a party; that the question as to the statute of limitations cannot arise, until after he has been made a party.

2. That the petition does show such an interest in Boykin, as entitles him to investigate the decree, the three years barring writs of error not having run against his wife before her death.—8 Ala. 177; 15 *ib.* 495.

3. That the act barring writs of error after the lapse of three years (Clay's Digest 309 § 17), applies only to judgments at law, and does not embrace decrees in chancery.

Smith & Chandler, *contra:*

1. The appeal is limited to three years.—Mazange v. Slocum & Henderson, 23 Ala. 668.

2. If the petitioner were made a party, the order would relate back to the rendition of the decree, and he would be barred.—Binford v. Binford, 22 Ala. 682.

3. There are no exceptions in the statute, and none will be implied.—Howell v. Hair, 15 Ala. 194; 22 *ib.* 682. Nor has the petitioner been under any disability.

LIGON, J.—We see no error in this record, nor has the counsel for the appellant been able to produce a precedent for his petition. We are aware of no rule of chancery practice, which allows a final decree, once made, and fully executed, to be opened on the petition of one who, by his own showing, had no interest whatever in the subject-matter of the controversy until long after it was terminated. To introduce such a practice, would tend to unsettle the decrees of the Chancery Courts to an alarming extent,—to protract litigation, and foster speculations upon supposed errors in the proceedings of courts of justice. Before we could sanction a practice which is pregnant with such consequences, we would require the production of some well established rule to authorize it. We have not been shown such a rule, and have been unable, in our researches, either to find one, or to see a good reason why it should exist. Our statutes provide an ample remedy for defendants against whom decrees are rendered, when they are laboring under any disability.

But neither they, nor any of the books, furnish a rule by which those who are alike strangers in interest and strangers to the record can come in and disturb a decree final its character, and fully executed, because, in defiance of the record, they subsequently purchase the interest which one of the parties to the record formerly had in the subject-matter of the suit. If this party is permitted to come in at this time, what is to hinder him from selling out his pretended interest after the court decreed against him, and by this means conferring upon his purchaser the same right with regard to that decree which he now claims for himself with respect to the one already rendered? Thus the litigation might be kept up for an interminable period, and the rights of the parties and the decrees of court remain unsettled for an indefinite time; and this, too, after the court, which had full jurisdiction of every interest and party involved, had, according to the known rules of both law and practice, finally pronounced sentence in the case.

2. The petitioner avers, in his petition, the purpose for which he desires to be made a party to the former suit, viz., that he may prosecute an appeal or writ of error, and thus have the decree reviewed. To this purpose he must be held.

The courts of justice in this State will never do a nugatory

act; and if the time, within which an appeal or writ of error from the decree rendered by the Chancellor could be prosecuted, had elapsed, before this petition was presented, then it would be a useless and nugatory act to grant its prayer.

We have already decided, that where one propounds his interest, and seeks to be made a party to the record in the Orphans' Court, and is so made, the order making him such will relate back to the time the decree was rendered; and if, in such case, the period intervening between the rendition of the decree and the time at which the new party is made, exceeds three years, he will not be allowed to prosecute a writ of error. —Binford v. Binford, 22 Ala. 682. The same rule, we apprehend, will apply with equal force to writs of error (under the old law), from decrees in chancery.

It was, however, insisted on in the argument, that the act of limitations, as it is found in Clay's Digest, 309 § 17, which declares, that "a writ of error may issue, to reverse any final judgment in the Circuit Court, at any time within three years after the rendition of the judgment, and not afterwards," does not apply to decrees in chancery; and consequently the right to prosecute a writ of error, in such cases, is unlimited as to time. We cannot assent to this construction of that statute. It was passed in the year 1818, when the chancery jurisdiction in this State belonged altogether to the Circuit Courts; and decrees pronounced by them may be well included under the term "judgments,', especially as these decrees, when made for the payment of money, are declared to have the force and effect of judgments, and are allowed to be executed by the same final process. It may well be doubted, whether any writ of error from a decree in chancery could be prosecuted at all, except under the authority of our statutes; and in this aspect of the case, the appellant's construction of the act of 1818 would wholly deprive him of the right to come here at all to complain of this decree. In England, such cases are invariably taken from the lower to the higher jurisdictions in equity by appeal, granted by the Chancellor; and our statutes, when the decree complained of in this record was made, required the order of the Chancellor, before an appeal could be taken; so that, if no writ of error were authorized by the statute, the decree of the Chancery Court would be final, on the adjournment of the term

at which it was pronounced, no appeal being prayed or granted during that term; a result as fatal to the petitioner's application, as the statute, limiting the prosecution of writs of error to three years, could possibly be.

There was no error in the decree of the Chancellor dismissing the petition, and it is consequently affirmed, at the costs of the appellant, both in this court and the court below.

THE STATE, EX REL. WARING, *vs.* THE MAYOR, ALDERMEN, &c., OF MOBILE.

1. Where a decree has been rendered against the corporate authorities of a city for the abatement of a public nuisance, on an information in the name of the State at the relation of certain citizens, any citizen may interfere as relator, by a proceeding in the nature of a bill of revivor, and call on the court to carry the decree into execution.
2. Whether the statute requiring the revival of a judgment by a *scire facias*, when no execution was issued within a year and a day after its rendition (Clay's Digest 206 § 28), applies to a decree in chancery for the abatement of a public nuisance, on information filed in the name of the State at the relation of certain citizens, *quære?* But if it does apply, its only effect is, to compel the party seeking to enforce the decree to proceed by bill of revivor or *scire facias*.
3. The written opinion of the presiding judge, when the circuit judges were required to file their opinions in writing, was sufficient to authorize the rendition of a judgment *nunc pro tunc* at any subsequent stage of the proceedings; and if it recited the fact of the defendant's appearance, it would be sufficient to sustain the judgment without service of process.
4. On a bill filed to enforce the execution of a decree, if the record shows sufficient to authorize an amendment of the decree *nunc pro tunc*, by reciting the fact that the defendant therein appeared although not served with process, the court will consider the amendment as made, and will sustain the former decree.
5. There are cases where a court of equity, on a bill filed to enforce the execution of a decree, will refuse to enforce the decree if it is unjust; but this will not be done when the proceeding is in the nature of a bill of revivor.
6. Where a municipal corporation is purely political in its character, and intended solely for the local government of a city, its charter may be amended, and its name changed, while the coporation itself remains the same.

7. Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers upon it under a new name, and with additional powers, the latter act does not repeal the former.

APPEAL from the Chancery Court at Cahaba, to which the cause had been transferred from the Mobile Chancery Court.

HEARD before the Hon. JAMES B. CLARK.

P. HAMILTON and GEORGE N. STEWART, for appellants.

JOHN T. TAYLOR, *contra*.

(No briefs have come to the Reporter's hands.)

GOLDTHWAITE, J.—It appears from the record, that in 1836 an information was filed by the solicitor of the Mobile Circuit in the name of the State, on the relation of certain individuals, against the mayor and aldermen of the City of Mobile, to enjoin the erection of certain markets, then building in Government street in that city, and to abate and cause to be removed them, and others at that time erected. In May, 1839, a final decree was rendered, declaring that the market house buildings and obstructions as set forth in the bill were a nuisance; that a perpetual injunction issue, and that the nuisance be abated by the defendants.—The decree remained unexecuted until October, 1852, when Moses Waring and others applied by petition to the Court of Chancery, to have the decree executed by the mayor, aldermen and common council of Mobile, on whom a rule was served to show cause, and who appeared, and in their answer objected to the execution of the decree on the following grounds:

1. That the relators had no right to prosecute the decree.

2. That the statute (Clay's Digest 206 § 28) is a bar to the prosecution of the same.

3. That the court which rendered the decree had no jurisdiction; that the corporation against which it was rendered had never been made a party and never appeared, and that no decree *pro confesso* had been passed.

4. That the allegations contained in the information, on which the decree was rendered, were untrue.

5. That the corporate authorities of Mobile, as then consti-

tuted, were not the corporation against which the decree was rendered, but are a new corporation, created by the act of 1844.

6. That the State, by the act of 1844, waived all its rights under the decree, and sanctioned the use of the market by the corporation.

As to the right of the petitioners to prosecute the decree, it is only necessary to observe, that the present proceeding is in the nature of a bill of revivor to carry a decree into execution ; and it is not necessary, in all cases, that bills of this character should be filed by the same persons who were parties to the original decree. It may, sometimes, be exhibited by one outside of the record, but who claims in a similar interest.—3 Dan. Ch. Pr. 1689, 1690. Here, the decree was for the abatement of a public nuisance ; and as the rights of the State were immediately and directly concerned, the law officer of the State might well have proceeded upon his own authority, without the intervention of any other person as relator.—1 Dan. Ch. Pr. 11. The only necessity for a relator being connected with the proceedings, in such case, is, that there may be a party responsible for the costs, and the conduct of the case; but when the act ascertained by the proceeding is one detrimental to the public, and of a character which is punishable by indictment as a public nuisance, and when the object of the decree is to abate this evil—upon principle, every one who is a member of the community, whose interests are supposed to be prejudiced by it, is concerned in its abatement, and may, therefore, with propriety, call upon the court to enforce its decree.

We doubt whether the statute of 1835 (Clay's Digest 206 § 28) has any application to the case before us, for the reason, that the State is the party complaining, and because no length of time will confer a right to maintain a public nuisance (Mills v. Halls, 9 Wend. 315). But it is unnecessary to go thus far ; for, conceding that the statute does apply, under the construction given to it in Van Cleave v. Haworth, 5 Ala. 188, a judgment may be revived by *scire facias*, upon which no execution has been sued out for ten years; and in such case, no greater presumption of satisfaction arises, than if it had not been sued out for a year and a day after its ren-

dition. Under such circumstances a release is presumed; and therefore the defendant shall not be disturbed without being called upon, and having an opportunity of pleading the release, or showing cause, if he can, why execution should not go.—2 Tidd's Pr. 1003. This proceeding is, as we have said, in the nature of a bill of revivor, or *scire facias*. It calls upon the defendant to show cause why the decree should not be enforced; and the utmost effect the statute can have, in any case, is to force the party seeking the benefit of the decree to pursue this course before enforcing it, but it goes no further.

That the court which rendered the decree had jurisdiction of the subject-matter, was expressly decided by this court when the case was last here (5 Port. 279; and see also, upon this point, Atty. Gen. v. Hoole, 22 Ala. 190); and although we do not think the decree could be carried into execution, upon a bill filed for that purpose, if it appeared that the defendants were not before the court in the former proceedings, we do not understand such to be the case here.—The record of the proceedings previously had, shows that a motion was made by the defendants to dismiss for want of jurisdiction, and was sustained by the judge then presiding, and this decree was subsequently reversed by the Supreme Court. The law then in force required the judge to render his decree in writing (Aik. Dig. 288 § 19), which was done; and in that decree he states, that the defendants to the information appeared before him and made the motion. In the record the decree is embodied in the opinion, and no formal entry appears to have been made; but we regard this omission as altogether immaterial, as the opinion of the judge in writing would have been sufficient to have authorized the entry *nunc pro tunc*, at any subsequent stage of the proceedings.—Andrews v. The Bank, 10 Ala. 375. And we have often held, that an entry of record, reciting the fact of the defendant's appearance, was sufficient to sustain the judgment, without service of process.—Gilbert v. Lane, 3 Port. 267; Hobson v. Emanuel, 8 *ib.* 442; Moore v. Phillips, *ib.* 567. As this amendment could properly have been made, a court of equity will regard it as done, and, without delaying the cause, give the same effect to the statement of the fact in

writing, by the judge, as the Chancellor would have given, had the motion been made. As to the ground taken in the answer, that no decree *pro confesso* was rendered, it is unnecessary to say anything, as the record shows that such a decree was passed, before the final decree was rendered.

Neither can the objection taken to the merits of the decree be sustained. There are cases where the common process of the court will not serve, and an original bill is required, and a second decree upon that, before the first can be executed; and in these cases, if the first decree is unjust, a court of equity will not charge its conscience with promoting an apparent injustice, and, as the whole case is open, may well refuse to carry the decree into execution.—Lawrence v. Berney, 2 Ch. Rep. 127; Pr. in Ch. 134; Atty. Gen. v. Day, 1 Ves. 218. But no such case is made here. The proceeding is in the nature of a bill of revivor, rather than an original bill; and the right of a party to prosecute the decree, and to do what is necessary for that purpose, does not depend upon the merits of the decree.—Story's Equity Pleadings, § 370 a.

As to the question, whether the corporate authorities of Mobile, as at present constituted, are the same corporation against which the decree was rendered, we have no difficulty. The corporation against which the decree was rendered, was created by the act of 1819 (Toulmin's Digest 784); and as it was purely political in its character, and intended solely for the local government of the City of Mobile, it was competent for the Legislature not only to amend, but to abrogate its charter.—People v. Morris, 13 Wend. 325; The Governor v. McEwen, 5 Humph. 241. But it will be apparent from an examination of the act of 1844, that that statute was not intended to repeal the former act, but simply to reorganize the corporation which was existing under that act, and to amend its charter. The first incorporated the inhabitants of Mobile, by the name of the mayor and aldermen of the City of Mobile; and by it the powers deemed necessary for the government of the city, were vested in the mayor and aldermen. The act of 1844 created no new incorporation: the persons who were incorporated under the first statute, remained incorporated under the

last. A change was made, it is true; a board of common council-men were added to the city authorities, and the governmental powers were given to the mayor, aldermen and common council, instead of the mayor and aldermen, and the name of the corporation was altered, but the corporation itself remained the same. It was the inhabitants of Mobile who were incorporated by the first act, and this provision was in no wise changed or affected by the last. No alteraation was made in the body politic; and, as was correctly said by the Chancellor, "it was the same identical personage who violated the law of 1820, which was an amendment of the act of 1819, who was required to show cause why the decree should not be enforced."

The only remaining question presented, is, whether by the act of 1844 the State waived its right to the enforcement of the decree; or, in other words, whether that act operated as a repeal of the law which fixed the width of Government street at one hundred feet, and consequently made it a nuisance for any one to diminish its width, by any obstruction. 5 Port. 279. The Chancellor was of the opinion, that the provision referred to, contained in the act of 1820 (Toulmin's Digest 791), was repealed by the forty-sixth section of the act of 1844 (Acts of 1843–4, p. 190), containing the same provision; and in this respect his opinion was erroneous.—The last statute is precisely what is indicated by its title, that is, "An act to consolidate the several acts of incorporation of the City of Mobile, and to alter and amend the same." Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent act does not annul the rights and powers given under the former act, and under its former name.—Commonwealth v. Worcester, 3 Pick. 474.—The plain object of the Legislature, in the act of 1844, as is shown by the body of the act, as well as its title, was not only to alter and amend, but to consolidate and reduce into one, the several provisions of the former acts of incorporation. The corporation, as we have seen, was not changed; and to hold that the insertion of the same provision in the new act, which is contained in the old, was a repeal of the

latter, would be to defeat the intention of the Legislature, whose object was not repeal, but consolidation. Indeed, so far from the provision in the new act operating to annul the same provision in the old, we think it was inserted in the last act to show the more clearly that it was intended to be kept alive.

This disposes of all the questions presented upon the record. The Chancellor, instead of dismissing the proceeding, should have rendered a decree, reviving the former decree, and directing the same to be carried into execution; and the case must be reversed and remanded, in order that such decree may be rendered. The appellants must pay the cost of this court.

WARE *vs.* CLOWNEY.

1. In slander for words spoken, the words charged, which were alleged to have been spoken of and concerning plaintiff, and of and concerning his trade and occupation as clerk for the firm of defendant and his partner, were as follows: "Your man (plaintiff) is plotting to blow me (defendant) and the concern (the firm) up, and I believe you have a hand in it:" *Held*, that the words were actionable, *per se*, when connected by the *colloquium* and innuendo with the plaintiff's occupation as clerk, without an averment of special damage: and that they were spoken in the present time, makes no difference.

ERROR to the Circuit Court of Shelby.

The record does not show the name of the presiding judge.

THIS was an action of slander, by Clowney against Ware. The declaration contains two counts: The first avers, in substance, that the plaintiff was by trade a clerk, and at the time of the grievance complained of was in the employment of the defendant and one McClanahan, partners in the manufacturing of iron, as such; that the defendant, to vex, harrass, impoverish, oppress, and wholly ruin him, the plaintiff, in his said trade and occupation, and otherwise, in a discourse which he

had of the plaintiff, and of concerning him in his said trade and occupation, and his conduct and employment as clerk in the business of Ware & McClanahan, in the presence of one Jones Thompson and others, did, on the — day of July, 1849, falsely and maliciously speak and publish, concerning his said business and employment, the following false, malicious and defamatory words: "Your man Clowney (plaintiff) is plotting to blow me (defendant) and the concern (iron business) up, and I believe you (Thompson) have a hand in it. Clowney (meaning plaintiff) is a scoundrel; is a dishonest man; is a rascal; is a swindler. You and Thompson have colleagued together, to blow me and the concern up."

The second count is like the first, except that it counts alone upon the words: "Your man Clowney (meaning the plaintiff) is plotting to blow me (defendant) and the concern (the iron business) up, and I (defendant) believe you (Thompson) have a hand in it;" and then proceeds to aver, that Thompson, the person to whom these words were addressed, was also employed by the defendant and McClanahan in the business of making iron and digging iron ore, and that the defendant meant by these words to charge plaintiff and Thompson with being guilty of the offence of conspiracy to ruin and destroy the said business of Ware & McClanahan; by means of all which, he has been injured, &c., in his reputation and trade, and Ware & McClanahan have refused to employ him, or continue him as their clerk; to his damage," &c.

The defendant demurred to each count separately in the declaration, which demurrer was overruled; and this ruling of the court is assigned for error.

White & Parsons, for plaintiff in error:

Words are to be construed according to their popular use, and not in their most harsh or innocent sense.—Hogg v. Dorrah, 2 Por. 213. To plot is to plan, to scheme, to contrive, to form a scheme of mischief against another. It does not ordinarily involve anything legally criminal. To plan, or scheme, or contrive to blow up a man or his business, would not reach the criminal intent necessary to constitute the offence of conspiracy.—See definition of conspiracy, Clay's Dig. 430 § 23.

These words, as stated in the first count, without an innuendo,

it is contended, are not sufficient, of themselves, to constitute a charge of conspiracy, and are both changed and enlarged by the innuendo in the second count, in such manner as to vitiate the declaration.—Starkie on Slander 295.

The words used are in the present tense. They do not import an act done, but in process of being done. To say of a man, "You are murdering that man," would be no slander, because it leaves the offence incomplete. So, to say "You are plotting to blow me," leaves the offence incomplete.—Eaton v. Allen, 4 Co. R. 16; Cro. Eliz. 684; Scaton v. Cordvay, Wright 101; Mckee v. Ingalls, 4 Scam. 30. The word "swindle" is not actionable *per se*.—Chase v. Whitlock, 3 Hill 139; Stevenson v. Hayden, 2 Mass. 406.

An allegation that certain persons who are named, and divers other persons, would otherwise have employed plaintiff, is not sufficient to authorize proof of special damage by others than those who are named.—Johnson v. Robertson and Wife, 8 Por. 486.

Special damage, to sustain an action of slander, must be the legal and natural consequence of the slander.—Vicars v. Wilcocks, 8 East 3.

To maintain an action for words spoken, on the ground that they were injurious to the plaintiff in his business or occupation, the words must relate to his business character, and must impute to him misconduct in that character; and it is not sufficient that the words are imputations on his morality, temper, or conduct generally, which would be injurious to him whatever was his pursuit.—Inland v. McGavish, 1 Saund. S. C. R. 155.

John T. Morgan, *contra*, in support of the declaration, cited the following cases: Burtch v. Nickerson, 17 Johns. 217; Lindsay v. Smith, 7 *ib*. 360; Johnson v. Robertson and Wife, 8 Por. 486; Sel. N. P. (2 vol.) 1273-5.

CHILTON, C. J.—We may concede, that the words alleged as slanderous are not actionable, as imputing a criminal charge; but then the question comes up, Are they not actionable, *per se*, when connected by the *colloquium* and innuendo with the business or trade of the plaintiff as clerk? We have looked into the cases upon the subject with much care, and, although our

first impression was the other way, we are satisfied that the declaration is good. It is averred, that the words were spoken of and concerning the plaintiff and his conduct as clerk, with intent to injure him in his said calling or trade. The words charge the plaintiff with plotting the ruin of one of his employers, in blowing up him and the concern with which he was connected as clerk.

That such an act of perfidy and mischievous scheming was calculated to injure him in his employment and calling, if it was true that he was guilty, there can be no question; and we think the authorities fully sustain the action.

In Johnson v. Robertson and Wife, 8 Porter 486, it was held, that to say of a physician "he has killed the child by giving it too much calomel," is actionable, without an averment of special damage.

In Ostrom v. Calkins, 5 Wendell 263, the following words were spoken of a distiller, who purchased grain on a credit for the purpose of carrying on his business: "There is a time when men will fail, who must fail, and Ostrom's time has come:" held that these words, connected with the circumstances, were actionable. Parker, C. J., said, "that words are actionable, which directly tend to the prejudice of any one in his office, profession, trade or business, in any lawful employment by which he may gain his livelihood."

The authorities generally concur in upholding this action, in three classes of cases which injuriously reflect upon the trade, profession or business of an individual, namely: 1st, when the words charge the person with a want of fidelity in his trade or profession generally; 2nd, where they charge such person with dishonesty, corruption, or want of integrity, in a particular case; and, 3d, where the words impute ignorance, or want of skill and capacity, in general terms.—8 John. 66, *arguendo*, and cases cited.

In Mott v. Comstock, 7 Cowen's R. 654, in speaking of the plaintiff's circumstances as a merchant, and of a debt due by him to one Harris, the defendant said: "There is poor Harris; it is hard for him to lose his debt;" *innuendo*, that the plaintiff was insolvent, and Harris would lose his debt in consequence of such insolvency: *Held*, that these words were actionable.

So, also, in Sewall v. Catlin, 3 Wend., a witness inquired of

the defendant "If there were any failures yesterday;" to which he replied, "Not that I know of; but I understand there is trouble with the Messrs. Sewalls:" *Held*, that these words, taken in connection with the interrogatory to which they were a response, and the further fact that the Messrs. Sewalls were merchants, implied that they were embarrassed in their pecuniary matters and would probably fail, and were consequently actionable. Starkie on Slander 117; 5 John. 476; and 17 *ib.* 218, were cited. To say of a blacksmith "he keeps false books, and I can prove it," is actionable, without special damage being averred.—7 John. 217, Burtch v. Nickerson. In Seaman v. Bigg. Cro. Car. 480, the words spoken of a servant "he is a cozening knave, and has cheated his master of barley," were held actionable.

So, also, in Thomas v. Jackson, 3 Bing. 104, to say of one who carries on the business of corn vendor, "You are a rogue, and a swindling rascal. You delivered me a 100 bushels of oats worse by 6d. a bushel than I bargained for," was held actionable, without proof of special damage; and Best, C. J., said, "that such would be the case with any words which imputed to a man fraudulent conduct in the business whereby he gained his bread." See, also, Bryant v. Lexton, 11 Moore's R. 344; Onslow v. Horne, 3 Wils. 186.

The case of Lumley v. Allday (1 Term R. 217, 223) was an action brought by a clerk of an incorporated company; and the Court of Exchequer goes fully into the doctrine, and the principle is recognized as sound, that words spoken of persons touching their respective professions, trades or business, and which naturally tend to their damage, are actionable. In this case, the court qualify the principle as asserted in Onslow v. Horne, *supra*, that it is sufficient if the words *probably* tend to the plaintiff's damage. In the latter case, special damage must be averred.

These authorities, without adding further citations, are sufficient to show, that the declaration in the case before us is good. The charge of plotting to blow up the business or concern, the interest of which he was employed as clerk to sustain and advance, involves an imputation of dishonesty, perfidy and dereliction of his duty as clerk, which is directly and necessarily injurious, if believed, and, according to all the better authorities, is actionable, without special damage being averred.

That the words were spoken in the present time, constitutes no objection in cases of this character, but only when a criminal charge is made. They would then show that the crime was not consummated, and its commission could not be imputed by the words thus used.

This view renders it unnecessary for us to examine the other objections raised in the argument.

Let the judgment be affirmed.

RUMBLY *vs.* STAINTON AND WIFE.

1. When slaves are sent by a father to his daughter's home on her marriage, the presumption of law is, that they are intended as an advancement to the husband, and they became his property prior to the passage of the laws securing to married women their separate estates. This presumption can only be rebutted by proof of a different intention, clearly and distinctly avowed by the donor at or before the time of delivery; his subsequent declarations, unless made in the presence of the donee and sanctioned by him, are not admissible for any purpose, in a contest between the donor and donee, or those claiming under them.
2. If the husband, in such case, after the delivery of the slaves, accepts a deed from the donor, conveying them to his wife and the heirs of her body, his marital rights are not thereby affected.
3. Evidence held insufficient to authorize the reformation of a deed of gift to a married woman, on an allegation of the donor's intention to exclude the marital rights of her husband.
4. An amended bill, which is repugnant to the original bill, cannot be allowed.
5. A bill will not be dismissed without prejudice, when the complainant has had ample opportunity to hunt up his testimony and prepare his case on the merits.

APPEAL from the Chancery Court of Monroe.

Heard before the Hon. J. W. LESESNE.

STAINTON and wife, and the former as administrator of two infant brothers of his wife who died in 1833, exhibited their bill in chancery, setting forth that the defendant, Rumbly, married Christiana Manning in 1827; that shortly after the marriage

the father of Mrs. Rumbly gave to her, for her own separate use, two negro girl slaves, and afterwards made to her a deed for them, which read, "to her and her heirs." This deed was delivered to her then husband, the defendant, who refuses now to produce or exhibit it, and claims and holds the slaves as his own. The bill further alleges, that the deed was drawn by an eminent lawyer, but that he mistook the instructions given him, which were that the slaves should be secured to Mrs. Rumbly as her separate estate. It further sets forth the death of Mrs. Rumbly in 1831, and that the complainants are all the heirs at law of Mrs. Rumbly; and prays that Rumbly may produce the deed, and that the same may be so reformed as to make it speak the intentions of the grantor, and that Rumbly be decreed to deliver up to complainants the slaves, and their increase, and to account for hire, &c.

Rumbly, the defendant, admits the marriage as charged in the bill, and that the complainants are the only heirs at law of his late wife Christiana; denies that Manning, his father-in-law, ever gave the negro slaves named in the bill to his wife in the manner set forth; but avers, that Rachel, one of the slaves mentioned, was given to him by Mr. Manning on the morning after his marriage, and sent to his house a day or two afterwards by the wagoner who brought the balance of his wife's chattels from her father's; that Critty, the other slave named, was sent to his house by his father-in-law, some time afterwards, unaccompanied by any words of gift; that he has ever since had both slaves in his possession; that after they had been in his possession for some time, his father-in-law proposed to make him a deed for them; to which he replied, "he (Mr. Manning) might consult his own pleasure about it;" shortly after this, Mr. Manning delivered him a deed for them, which conveyed them to his wife "and her heirs;" he does not know what has become of that deed; he has sought for it, and cannot find it, but thinks he gave it to the clerk of Monroe County Court, to be recorded, and supposes that it was burnt when the clerk's office of that county was afterwards destroyed by fire; it was not acknowledged by Manning or proved by the witnesses; he has always held the slaves as his own, and has no knowledge that Mr. Manning ever intended them to be held otherwise; denies that they were, or were ever intended by the donor to be, the

separate estate of his wife; does not claim alone under the deed, but under the parol gift formerly made which was in conformity with the deed of gift, in legal effect.

An amended bill was filed by Stainton and wife alone, without uniting the interests of the deceased infants, and to which they are not parties; in which it is alleged, that the slave Critty was given by Manning to Mrs. Stainton, before the deed was made to the defendant, and it is prayed that, as to said slave, the defendant be decreed to deliver her up, with her increase and hire, to Stainton, for the use of his wife. The answer to this bill denies its allegations, and concludes with a demurrer for want of equity, as the complainants had a plain remedy at law. It does not appear in the record that this demurrer was ever acted on by the court.

The proof, so far as it is deemed material, is noted in the opinion of the court. The Chancellor granted the relief sought by the bill, and his decree is now assigned for error.

R. C. Torrey, for the appellant, contended that the evidence was uncertain, contradictory, and insufficient to authorize the reformation of the deed, or the granting of the relief sought by the bill. He cited Bethea v. McCall, 5 Ala. 311; Miller v. Eatman, 11 *ib.* 613; Burnett v. Br. Bk. at Mobile, 22 *ib.* 642; Gayle v. Hudson, 10 *ib.* 128; Olds v. Powell, 9 *ib.* 865; 1 Story's Equity, pp. 164, 165, §§ 152, 153; Inge v. Murphy, 10 Ala. 885; Betts v. Betts, 18 *ib.* 787; Williams v. Maull, 20 *ib.* 721.

S. J. Cumming, *contra*, in support of the decree, contended: 1. That a court of chancery has power to decree the reformation of a deed.—Stone v. Hale, 17 Ala. 557; Whitehead v. Brown, 18 Ala. 682.

2. That the delivery of the negroes by Manning to Rumbly was a mere loan, as shown by the testimony, and that the title remained in the donor up to the making of the deed.—Olds v. Powell, 9 Ala. 861; 7 *ib.* 652; Miller v. Eatman, 11 *ib.* 609; Williams v. Maull, 20 *ib.* 729; Burnett v. Br. Bk. at Mobile, 22 *ib.* 642.

3. That the proof of mistake in drawing the deed was sufficient to authorize its reformation.—Stone v. Hale, 17 Ala. 557;

Whitehead v. Brown, 18 Ala. 682; Betts v. Betts, 18 Ala. 787.

4. That, admitting the previous delivery of the slaves to Rumbly, his acceptance of the deed was a waiver of his prior rights, and was equivalent to his consent to hold the slaves under the deed.—Inge v. Murphy, 10 Ala. Rep. 894; Fellows, Wadsworth & Co. v. Tann, 9 *ib.* 1003.

5. If the court should think proper to reverse the decree, he requested that the reversal might be without prejudice to any future suit at law or in equity.

LIGON, J.—It is legally impossible, on the pleadings and proof in this case, to sustain the decree of the Chancellor.

The only equity in the original bill is to be found in those allegations which relate to the mistake in drawing the deed from Manning, the father-in-law, to Rumbly, for the slaves in controversy; and the proof does not make out these allegations with that clearness which is required before a court of equity will touch the solemn deed of a party, and make it speak a different language from that employed on its face.

The proof in this case, in relation to the gift of the slaves, is confused and contradictory; and the same may be said of that which relates to the making of the deed now sought to be reformed.

On the first point, Julia Manning swears, that she frequently heard Manning (the donor) say, that he never intended to give Rumbly any of his property so that he could spend it, but intended what he gave for the use of his daughter and the heirs of her body; these intentions were so expressed both before and after Rumbly's marriage; that Rachel was given to his daughter, and Critty to Mrs. Stainton, his granddaughter, *as she heard the donor say*; she was not present when Rachel was given, but it was immediately after Rumbly's marriage, and Critty was not given until after the birth of Mrs. Stainton.

A. B. Manning deposes, that the donor was his father, and after the marriage of Rumbly his father *loaned* the girl Rachel to Mrs. Rumbly, as he heard his father say. He also heard him say, that he would not give his sons-in-law any thing; that he intended to secure it to his daughters during their lives, and to their children at their death; Rachel went into Rumbly's

possession immediately on his marriage, and Critty after the birth of Mrs. Stainton; both slaves were in possession of Rumbly and wife before the deed was drawn.

Eliza Rumbly, a daughter of donor, heard her father say, he would not give his sons-in-law any thing; he was in the habit of *loaning* slaves to his married daughters.

John Emmons proves, that Manning *gave* two slaves to Rumbly, one on his marriage, and the other some time afterwards, as the donor himself informed witness; that the slaves were named Rachel and Critty; witness knew the donor well, and was on very intimate terms with him; Rumbly had the slaves in possession; witness never heard of any separate estate in his wife.

Asa Parker proves, that he lived in the neighborhood of the donor and Rumbly since 1832, and knew both; Rumbly has had possession of the slaves during that time, using them as his own.

Wm. Raney is a grandson of donor, and lived with him when Rumbly was married, and from that time until his death; he proves that the negroes were delivered to Rumbly, or Rumbly and wife, by his grandfather; he drove the team that removed the effects of Mrs. Rumbly from her father's to her husband's house.

Thus it appears, that the witnesses, who attempt to show that the gift to Rumbly, on his marriage, of the slave Rachel, was not absolute in its terms, none of them, speak of what occurred at the time of the delivery, but testify of loose, general declarations of intention made by the donor, in many instances after the slaves had gone into Rumbly's possession, and at no time when he was present. Opposed to this is the fact, admitted by all, that the girl Rachel was delivered to Rumbly immediately after his marriage, and ever afterwards was retained and held by him as his own.

In such cases, the law presumes that the property, thus sent home to the daughter, by the father, is an advancement to the husband; and, as the law stood in 1827, when this delivery was made, it became the property of the husband, and the dominion of the donor over it ceased, so soon as the gift was perfected by delivery.—Miller v. Eatman, 11 Ala. 613. This presumption can only be rebutted by proof of a different inten-

tion, clearly and distinctly avowed by the donor, at the time the property is delivered, or the terms of the gift declared before the delivery takes place.—Miller v. Eatman, *supra*; Burnett v. Br. Bk. at Mobile, 22 Ala. 642. The after declarations of intention, on the part of the donor, unless made in the presence of the donee, and sanctioned by him, are not admissible, for any purpose, in a contest between the donor and donee, or those claiming under them.—Olds v. Powell, 9 Ala. 864. Apply these rules to the case before us, so far as it relates to the girl Rachel; and it is perfectly clear, that the marital rights of Rumbly attached fully to her, long before any deed was projected or made by Manning, the donor.

But it is said, that he (Rumbly) waived any right he might have had to the slaves, by virtue of the original gift, by accepting the deed. Suppose this were true, and that the deed handed him by Manning was to be looked to, as the sole evidence of his title, and the exponent of the donor's intentions as to both the slaves. Rumbly's interest would be the same, viz., an absolute property in them. So that, whether his title is made out by the proof of the gift by parol, accompanied with his possession under it, or by the deed delivered to him by his father-in-law, his right is the same; and the want of interest in the complainants is as well established in the one case as the other. For the deed, by the admission of all parties, vested the property, by its terms, in Mrs. Rumbly and her heirs, or the heirs of her body, and in such case the husband's marital rights would immediately attach.

2. The complainants, however, seek to reform the deed, upon the ground that its terms did not conform to the instructions given to the draftsman, or the intentions of the donor as declared to his agent at the time he was sent to the attorney to have the deed drawn. On this subject the proof is by no means free from conflict. The son of the donor, who went to Messrs. Cooper and Parsons, to have the deed drawn, says, that the instructions which he carried were for a deed to secure to Mrs. Rumbly a separate estate in the slaves. While the grandson of the donor says, he drew up a deed for Mr. Manning a few months before his death, giving these slaves to *Mrs. Rumbly and her children*, and afterwards another deed was drawn by a lawyer, giving the negroes *to her and heirs*; that Mr. Manning

dictated to witness how he wanted the deed drawn, and witness wrote it down, and it was taken to the lawyers (Cooper & Parsons), who drew up the deed from these instructions; he never heard the donor say any thing about giving the property in such a way that Rumbly could not control it, or to exclude his rights. This witness lived constantly with the donor before the marriage of Rumbly, and up to the period of the death of Manning. His opportunities of knowing the intentions of his grandfather were evidently as good as, if not better than, those of any other person who has been examined; and, when we reflect that what he says is entirely consistent with the unrestricted gift of the slaves in the first instance, as proved by several witnesses, and with the terms of the deed afterwards signed and delivered by the donor (who had read and sanctioned it, before he signed it), it is difficult, if not impracticable, for an unprejudiced mind to resist the conclusion, that it is the true history of the transaction. We do not think the proof of intentions of the donor, differing from those expressed in the deed, sufficiently clear and certain to authorize us in decreeing a reformation of it.

Upon the whole, we are of opinion, that Rumbly's right to the slaves in controversy was absolute and complete under the verbal gift and delivery of them to him, by his father-in-law (Manning), before the deed was made; and in accepting a deed which conveyed them to his wife and her heirs, he cannot be held, as the Chancellor supposes, to have agreed to hold them by a different tenure than that expressed on the face of the deed; nor can he be brought in subjection to any secret trust which was not made known to him at the time the deed was delivered, and assented to by him.

The amended bill does not seem to have commanded the attention of the court below, nor is it necessary to be noted here, except to say, that it is repugnant to the original bill, and for this reason should not have been allowed to be filed as an amendment. As an original bill, it is without equity, as in the case made by it the remedy is at law.—McCullough and Wife v. Walker and Wife, 20 Ala. 389.

The decree of the Chancellor, reforming the deed and directing an account, is erroneous, and must, therefore, be reversed. A decree must be here rendered dismissing the bill, at the cost of the appellees, both in this court and the court below.

It has been requested by the solicitor for appellees, that in the event the court should conclude to reverse the decree, and dismiss the bill, such dismissal should be without prejudice. There is no special reason in the record to justify such a course, but much, very much, to forbid it, and none is given outside of the record. There must be a time for litigation to end; and when the parties have had every opportunity to hunt up their testimony, and prepare their cases on the merits, as seems to have been the case here, we are not inclined to indulge a spirit of useless and vexatious litigation, which, from all that appears here, would be the result in this case.

MALINDA AND SARAH *vs.* GARDNER ET AL.

1. Slaves cannot contract marriage, nor does their cohabitation confer any legal rights on their children.
2. The property of a free negro, who dies intestate, escheats to the State, when there are no persons who can claim as heirs-at-law; and if the State, by act of the Legislature, afterwards relinquishes all its rights to the intestate's children, born of two female slaves with whom he cohabited, neither set of children is in a condition to insist on the necessity of an inquisition to vest title in the State.
3. Slaves which have escheated to the State may be emancipated by an act of the Legislature, and the validity of the act can only be questioned by one who shows a right of property in himself.
4. An administrator is not chargeable with a bequest made to the intestate in his life-time, when the knowledge of it is not brought home to him.

APPEAL from the Court of Probate of Dallas.

IN the matter of the final settlement of the estate of Tom, a free negro, by Garland F. Gardner, his administrator. The following facts are shown by the record:

The intestate belonged to Baxter Smith, who died in Dallas County, in 1828, leaving a last will and testament, in which he directed his executors to emancipate said Tom and a woman named Charity, with whom said Tom had cohabited, and by

whom he had two children, Malinda and Sarah, the appellants. After the death of said Baxter Smith, an act was passed by the Legislature of this State, approved December 24, 1828, authorizing his executor to emancipate said Tom and Charity, and their children, upon entering into bond conditioned that they should not become a charge to the State, nor to any county, town or city therein; and under this act the executor gave the bond required, and emancipated the slaves. Before the death of said Baxter Smith Tom had ceased cohabiting with said Charity, and had formed another connection with a woman of the same name, who was also a slave, and whom he purchased after his emancipation; with this woman he continued to cohabit until his death, and had three children by her, viz., Organ, Miles and Rebecca.

Tom having died in 1850, letters of administration on his estate were granted to said Gardner in June, 1850. An act of the Legislature was passed, January 12, 1852, emancipating the "negro slaves belonging to the estate of said Tom, to-wit: Charity, his widow, and Malinda, Sarah, Organ, Miles, and Rebecca, his children," upon their removal from the State within two years after the passage of the act; relinquishing all the rights which had accrued to the State, by escheat, in the property of said Tom; and enacting that, upon the said Gardner's executing a bond for the removal of said negroes from the State, "then the said Charity, Malinda, Sarah, Organ, Miles, and Rebecca shall be qualified, in law, to take and inherit the estate, real and personal, of the said Tom, in such portions as it would descend to them by the statute of distributions.—Pamp. Acts 1851–2, p. 486. The said Gardner executed the bond required by this act. Upon this evidence, the court decided, that said Malinda, Sarah, Miles, Organ and Rebecca, were entitled to share equally, as distributees, in the estate of said Tom; and to this ruling of the court, the said Malinda and Sarah excepted.

On the settlement of the administrator's accounts, the distributees sought to charge him with the amount of a legacy of $500, bequeathed to said Tom by one Bartholomew Smith, whose will was admitted to probate in October, 1847. The only evidence introduced in support of this charge, was "the record of the final settlement of the estate of said Bartholo-

mew Smith, and the decrees rendered therein; by which," as the bill of exceptions states, "there was nothing to show that said legacy, or any part thereof, had been paid to said Tom." The court refused to charge the administrator with the amount of this legacy, and the appellants excepted. These two rulings of the court are now assigned for error.

George W. Gayle, for the appellant:

1. The Probate Court should have charged the administrator with the legacy of $500, because it was not barred, and he could have collected it.—Duffee v. Buchanan, 8 Ala. 27.

2. Malinda and Sarah are the only heirs of Tom, and entitled to his estate: 1st, because they took inheritable blood by their emancipation in 1828. Tom and their mother, were man and wife, in slavery, so far as natural law and moral obligation could make them so. The relation between them as man and wife, even in that humble condition, was not against law. They were not fornicators, nor guilty of adultery, but were husband and wife, *de facto*, and bound by moral obligation, recognized by law.—State v. Smith, 9 Ala. 990. Emerging from slavery by the act of 1828, they find themselves in freedom, as husband and wife and children, and live in this way for awhile after emancipation. They are man and wife and children, then, after emancipation.—State v. Murphy, 6 Ala. 767; Wall v. Williamson, 8 Ala. 48. 2nd. Because the act of 1852 gives them inheritable blood again.—Act of 1852. These are the proofs of the right of inheritance of Malinda and Sarah, alone.

3. Organ, Miles and Rebecca are not heirs of free Tom: 1st, because they were the slaves of Tom, and have never been emancipated.—Act of 1852. 2nd. Because, being slaves, they could not take inheritable blood under the act of 1852. 3. Because, if the act of 1852 frees them, the Legislature had no right to pass it.—Con. of Ala. title "slaves." 4. Because, being slaves, the Legislature could make no gift to them, either of emancipation or right of inheritance. Such a gift would inure to the benefit of the owner of the slaves.—Brandon v. Bank, 1 Stewart's R. 320; Coleman v. Allston, 7 Ala. 795; Carroll v. Brumby, 13 *ib.* 102.

1. In reply: It is said, that by the death of Tom his property escheated to the State, and, having escheated, the State

had the right to do with it as it pleased, and therefore had the right to give it in part to "Miles, Organ and Rebecca." This argument is met thus: 1st, the act of 1852 does not free them, and while slaves they can take nothing. 2nd. There were heirs of Tom (Malinda and Sarah), and they were their slaves. Malinda and Sarah were given inheritable blood by the act of 1852, even if they did not have it before. This act, to this extent, was legal. 3. Tom's estate had not escheated, and the State had no control over it. There had been no inquiry as to heirs, as directed by law.—Clay's Digest. That there was no inquiry, is evident from the language of the act of 1852, which relinquishes all such property as has or may escheat. If there was an escheat, the property must be disposed of as the statute directs.—2 Brev. 31; 18 Ala. 565. 4th. If there was an escheat, the relinquishment was not to "Miles, Organ and Rebecca"—slaves—but to the children of Tom previously emancipated. The relinquishment is in the first section of the act, and is to no one in particular, but must be to such as are morally entitled to it as free people. 5. But there was no escheat; and the question is, had the Legislature the right to emancipate "Miles, Organ and Rebecca," if they did so by the act of 1852.

Wm. M. Murphy, *contra*:

1. Upon the death of Tom, there was no person capable of inheriting his estate. Organ, Miles, and Rebecca could not inherit, as they were slaves; Malinda and Sarah could not inherit, as they were children born in slavery, and not the issue of lawful wedlock. The marriage of slaves is a nullity.—Smith v. The State, 9 Ala. 990. The child of a slave could not inherit at common law.—Jackson v. Lerry, 5 Cowen 397. Nor could they inherit by the civil law.—See cases cited in 5 Cowen on page 402; Taylor's Elements of the Civil Law 429; Cooper's Just. 411, 420.

2. The act of emancipation did not legitimate the issue, or legalize the cohabitation of Tom and Charity (No. 1): 1st, because Tom and Charity (No. 1) were not cohabiting together at the death of their owner; but, on the contrary, Tom was cohabiting with Charity (No. 2) as his wife, and continued with her to the time of his death; 2nd, because the act of emanci-

pation does not legitimate the issue; 3rd, because the act of emancipation could not legalize that which was not in existence; 4th, because neither the will, nor act of emancipation, in any way recognize them as the children of Tom; 5th, because the act of emancipation is not retrospective.—5 Cowen 397.

3. There being no lawful heirs of Tom at his death the title vested, *eo instanti*, in the State, and the State can vest the same in a third party, and no inquest of office is requisite in such cases.—Etheridge v. Doe ex dem. Malempre, 18 Ala. 575; 6 Johns. Ch. R. 366.

4. Before the act of 1852, the estate of Tom vested in the State of Alabama by escheat, and by the act of 1852, the General Assembly relinquished it to Charity (No. 2), the last wife of Tom, Malinda, Sarah, Organ, Miles and Rebecca; and this is the act under which Sarah and Malinda claim.

5. The judge of the Probate Court decreed the distribution according to the act of 1852; which provides, that "Charity, Malinda, Sarah, Organ, Miles and Rebecca shall be qualified, in law, to take and inherit the estate, real and personal, of the said Tom, in such portions as it would descend to them by the statute of distributions of this State." Charity (No. 2) is the person meant in the act of 1852.

6. It is contended that Charity, Organ, Miles and Rebecca are not free under the act of 1852. The General Assembly emancipated them by making them lawful heirs and distributees. The Legislature gave them their distributable portions of the estate of Tom, provided they gave bond with sufficient sureties to leave the State within two years. This they have done.

7. As to the constitutional objection, this is not a contest with creditors. The debts of the estate are all paid, and Tom's estate has escheated; the State can certainly relinquish its right of property.

8. The administrator was not chargeable with the legacy bequeathed to Tom by Bartholomew Smith; because there was no proof that he even knew of it, nor that Tom had not collected it in his life-time, nor that the executor ever assented to it.

GOLDTHWAITE, J.—Malinda and Sarah could not claim as heirs proper of their father, for the reason that both the

father and mother were slaves, and persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights, with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract, are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other be recognized, without doing violence to the rights of the owner. In other words, the subjects of the contracts must cease to be slaves, before the incidents inseparable to the relation of marriage, in its proper sense, can attach. This has always been the doctrine of the civil law (Taylor's C. L. 429; Cooper's Justinian 411, 420; Puff. B. 2, c. 7, § 11); and in every State where slavery exists, and the question has been presented, it has been so decided.—Bynum v. Bostick, 4 Dess. 266; Cunningham v. Cunningham, Cam. & Nor. 353; State v. Samuel, 2 Dev. & Bat. 177; Girod v. Lewis, 6 Mart. La. Rep. 559; Smith v. The State, 9 Ala. 990. There was, indeed, among slaves a permitted cohabitation called *contubernium*, but it brought with it no civil rights. The cohabitation, therefore, between Tom and the mother of Malinda and Sarah, in a state of slavery, was not marriage, or evidence of marriage. It conferred no rights upon the offspring, and created no legal disabilities on the part of the father from forming a valid marriage, whenever he became in a condition which would authorize him to contract one. But the record contains no evidence that this relation existed between himself and the mother of the appellants, at any time after their emancipation; on the contrary, the testimony shows, that before he became free he ceased to cohabit with her, and formed a connection with Charity, one of the appellees, which continued up to his death. As the last woman referred to was also a slave, there could have been no marriage with her, and the children of that connection had no inheritable blood; and the necessary consequence would be, if there were no persons who could claim as heirs at Tom's death, his property would escheat to the State. The State, however, by the act of 12th of January, 1852, relinquished all its right to the property, and conferred upon the appellants and certain of the appellees the right to take the same, which was equivalent to surrendering to them all the rights which it had acquired by the death of Tom without heirs; and the appel-

lants do not stand in a position which will authorize them to insist upon an inquisition as necessary to vest the title in the State; since, having no inheritable blood, they can only take by virtue of the relinquishment made by the State, and if the latter has no title they have none.

Neither can the argument which has been urged on the part of the appellants, that the act of 1852 did not operate to emancipate Charity and her children, Organ, Miles, and Rebecca, be sustained. The act, in express terms, emancipates them, and operates as a grant of freedom to them, subject to be defeated by the non-performance of the conditions which are annexed, but which the record shows have been complied with. It is true, that the constitution prohibts the manumission of slaves without the consent of their owners.—Con. Tit. Slaves. But in the present instance, the Legislature regarded the slaves as the property of the State, and in the capacity of owner the State emancipates them. The validity of this act is not to be questioned, except by one who shows a right of property in himself; and, as we have seen, the appellants do not stand in that situation. The court below, therefore, committed no error, in holding that Charity and her children were entitled to take under the act of 1852.

The only remaining question is, whether the administrator should have been charged with the legacy left to the intestate by the will of Bartholomew Smith. This will, as the evidence shows, was admitted to probate in 1847. Gardner, the appellee, administered upon Tom's estate in 1850; and there is no evidence whatever that he knew the bequest had been made. That the administrator may subject himself to be charged with a debt due his intestate, which has been lost by his negligence or mismanagement, is a clear proposition (Duffee v. Buchanan, 8 Ala. 27); but here there is no proof of either the one or the other. It certainly could not be expected of the administrator, that he should examine every will which was probated, in order to ascertain whether his intestate was entitled to anything under it. Knowledge of the bequest not being brought home to Gardner, we do not think he should be charged with it.

Judgment affirmed.

INDEX.

ADVERSE POSSESSION.

1. A deed which is void as to third persons on account of an adverse holding, is nevertheless valid and binding as between the parties themselves; and the fact that the vendee was in possession, as tenant of the adverse holder, does not affect the principle.—Abernathy v. Boazman, 189
2. In an action for a breach of covenant of title, evidence that the vendee himself was in possession, as tenant of an adverse holder, at the time his deed was executed, is not admissible for the vendor: the fact that both parties knew of the adverse holding, and that there was no fraud, does not relieve the vendor from the liability to make good his covenant. 189

AGENCY.

1. Where two persons are employed in the same general business by a common employer, if one is injured by the negligence of the other, the employer is not responsible (*per tot. cur.*); but whether this rule applies to owners of a steamboat, when sued for the loss of a slave who was hired as a deck hand on the boat, and whose death was caused by a collision occasioned by the carelessness of the captain, who was one of the owners, *quere?* (Chief Justice Chilton and Justice Ligon holding the negative, and Justices Goldthwaite and Phelan the affirmative.)—Cook & Scott v. Parham, 21
2. The owners of the boat would be responsible for the loss of the slave, if his death was the legitimate and natural consequence of the collision, and the collision was caused by the negligence of the defendants; and if his death was occasioned by his own act in leaping into the river, when frightened out of his ordinary presence of mind by the excitement, confusion and danger caused by the collision, it would be the legitimate consequence of that collision. 21
3. It is the duty of the owners to use due care in providing competent officers for the boat, and the bailor may hold them responsible for the neglect of this duty, although he had the means of knowing the officers' characters for care and skill when he hired his slave to them. 21
4. If the collision was caused by the negligence or fault of the pilot, and the owners had the means of knowing that he was careless and reckless, they are responsible for the injury. 21

AGENCY—CONTINUED.

5. When an agent pays the money of his principal to a person who is not authorized to receive it, the principal may sue the receiver in assumpsit for money had and received; but the bringing of such an action is a ratification of the payment, and discharges the agent from all further responsibility.—Van Dyke v. The State, 81

6. An agent to sell cannot himself become the purchaser without his principal's consent; if he is surety on his principal's notes for the purchase money, he has the right to secure himself and the deed, which he had taken from his principal's vendor to himself, would give him a lien to the extent of the money which he paid; but if he had other moneys of his principal in his hands at the time of his purchase, his lien would be diminished to that extent.—Walker v. Palmer, 358

7. An endorsement of a note by one of the makers, purporting to transfer it, by written power of attorney, in the name of the payee, must be held to be the act of the payee himself.—Garrett et al. v. Holloway & Malone, 376

8. When one makes a demand as agent of another, reasonable evidence of his authority may be required; but if the party fails to do this, and rest his refusal on the ground of right in himself, he cannot afterwards object to his want of knowledge of the agent's authority. McNeill & Furniss v. Easley, admr., 455

9. In trover for the conversion of a slave, a witness who, as agent of plaintiff, brought the slave to this State, is competent to prove his own agency; and although his testimony also tends to show that the slave was sold under attachment against himself, sued out by defendant, this does not render him incompetent, if there is no evidence showing that he consented to the levy or sale.—Napier et al. v. Barry, 511

10. When an admission of record is made by counsel in the court below, for the purpose of obviating the necessity of proof, it will be presumed that he had authority to make it, and the admission cannot be withdrawn in the appellate court.—Montgomery v. Givhan et al., 568

APPEALS AND WRITS OF ERROR.

1. When one defendant wishes to revise a judgment rendered against himself jointly with others, he has the right to use their names for this purpose; but, if they are unwilling to join in assigning errors, they must be summoned after the case comes to the Supreme Court; and on their failure to join after such summons, an order of severance is granted, and the appellant then prosecutes his appeal separately.—Savage & Darrington v. Walsh & Emanuel, 293

2. And if the appellant in such case dies, having given bond with security to supersede the judgment, the suit may be revived in the name of his personal representative. 293

3. When a transcript is filed at a term subsequent to that to which the appeal was taken, the appeal will be dismissed on motion of the appellee, and the appellant may sue out another appeal at any time before the affirmance of the judgment; but the appellee cannot have a dismissal of the appeal and an affirmance of the judgment

APPEALS AND WRITS OF ERROR—CONTINUED.

at the same time, and on the same transcript.—Perryman v. Camp, 438

4. The appeals spoken of in sections 3019 and 3020 of the Code, are appeals from final judgments or decrees, and not from those which are interlocutory only.—Powell v. Central Plank Road Co., . 441

5. The register has power, under the Code, to grant an appeal from an interlocutory order of the Chancellor dissolving an injunction in vacation (Ligon J., *dissenting*). 441

6. A writ of error will be quashed, on motion, when the record shows that the defendant therein was dead when the writ issued, and that he had no legal representative.—Wesson et al. v. Crook, 478

7. Writs of error are governed, as to the practice in making parties, by the rule laid down in Sewall v. Bates, 2 Stew. 462; but when an appeal is taken under the Code, parties may be made in court below (§ 3069). 478

8. When an appeal is taken under the Code, and security for costs merely is given, it is only necessary that the surety should acknowledge himself liable for the costs of the appeal as under the old practice; but if a bond is given to supersede the judgment (§ § 3019, 3041), it is the duty of the clerk to send up a copy of it with the record (§ 3032). When the clerk merely certifies that the appellant "has given bond, with A. B. security for said appeal," and does not send up a copy of the bond, the appeal will be dismissed on motion. Spencer, adm'r, v. Thompson and Wife, 512

9. A writ of error does not lie from a decree of the Court of Probate, purporting to have been rendered on the final settlement of an estate, and reciting that the administrator "moved the court to be discharged on the grounds of payment and delivery of the property in his hands to the heirs; which motion being argued by counsel on both sides, and due deliberation had thereon by the court, it is considered by the court that the testimony is not sufficient to discharge the administrator."—Hamilton, adm'r, v. Gwynn & Wife, 515

10. When a party propounds his interest by petition to the court, praying to be made a party to a suit that he may prosecute an appeal or writ of error from the final decree, the order making him a party would relate back to the time when the decree was rendered; and therefore, if his petition shows that an appeal or writ of error from the decree is already barred by the statute of limitations, it will not be granted. This rule applies equally to Chancery Courts and Courts of Probate.—Boykin v. Kernochan, 697

11. The limitation prescribed to writs of error by the act of 1818 (Clay's Digest 309 § 17), applies to final decrees in chancery, as well as to final judgments at law. 697

ASSUMPSIT.

1. When an agent pays the money of his principal to a person who is not authorized to receive it, the principal may sue the receiver in assumpsit for money had and received; but the bringing of such an action is a ratification of the payment, and discharges the agent from all further responsibility.—Van Dyke v. The State, 81

2. If one contracts to serve another for one year, at a stipulated sum

ASSUMPSIT—CONTINUED.

payable monthly, and is discharged, without any fault on his part, before the expiration of the year, he may treat the contract as still subsisting, and sue in assumpsit for wages due according to its terms, or he may consider it rescinded, and sue for unliquidated damages for its breach; if he sue on the contract, he can only recover the wages due by its terms before the institution of the suit; if for damages for breach of contract, he is entitled to recover the actual damage sustained up to the trial; but the sum specified in the contract would not, of itself, be the exact measure of such actual damage.—Fowler & Prout v. Armour, 194

3. *Assumpsit* for use and occupation does not lie against a mere naked trespasser.—Weaver v. Jones, 420

ATTACHMENT AND GARNISHMENT.

1. The question whether the State can commence a suit by attachment, cannot be raised by a demurrer to the declaration.—Van Dyke v. The State, 81
2. Where slaves are attached, and sold under an order of court as "perishable property," the sale is sufficient to pass the title to the purchaser (LIGON, J., *dissenting*).—Millard's Adm'rs v. Hall, 209
3. An order of court directing the sheriff to "proceed to sell" certain property in his hands, which he had attached, and "pay the proceeds into court," is a sufficient authority to him to make the sale, without any process or copy of the order from the clerk. 209
4. A garnishee answered, that he would have been indebted to the defendant in a larger amount than the plaintiff's judgment, but before the service of the garnishment one H., who held a note against said defendant for a larger sum than garnishee's debt, proposed to sell said note to garnishee, who consented to take it to the extent of his indebtedness to defendant, the amount of which was not then ascertained; that the note, which had been mislaid, was to be delivered to him when found, but nothing was said about an endorsement; that the note was endorsed and delivered to him after the service of the garnishment, the endorsement being antedated to correspond with the agreement: *Held*, that the plaintiff was entitled to judgment against the garnishee on this answer.—Self v. Kirkland, 275
5. An ancillary attachment, sued out after the Code went into operation, in a suit commenced by ordinary process under the old law, is a part of the original suit, and must conform to the provisions of the old law.—Frankenheimer v. Slocum & Henderson, 373
6. When a defendant in a judgment at law is garnisheed as the debtor of the plaintiff, and pays the amount of the judgment to the attaching creditor, he may avail himself of the payment by a motion to enter satisfaction of the judgment against him.—Hagadon v. Campbell, 375

CASE, ACTION ON THE.

1. When the act incorporating the municipal authorities of a city makes it their duty to keep in repair the bridges and streets within the corporate limits, and in consideration thereof relieves them from other

CASE, ACTION ON THE—CONTINUED.

duties, an action on the case lies against them for a neglect of this duty, in favor of a person who is thereby injured.—Smoot v. Mayor, &c., of Wetumpka, 112

2. When such action is brought to recover damages for injuries caused by the fall of a bridge, it is not necessary to aver in the declaration that the bridge was broken without any fault on the part of the plaintiff; nor that he could not pass the street, of which the bridge formed a part, without crossing the bridge; an averment that it was defendants' duty to keep the bridge in repair, and that the injury resulted from its unsafe and rotten condition, which rendered it incapable of sustaining the usual burdens which were accustomed to pass over it, is sufficient. 112

3. A count averring that the bridge was private property, not belonging to the corporation, and had become a public nuisance from its unsafe and rotten condition, and that said corporation, knowing this, failed to abate it, as they by law were authorized and required to do, whereby, &c., is bad on demurrer; the failure to exercise judicial power properly, in the absence of malice and corrupt intention, constitutes no ground of action. 112

4. Where plaintiff declares in case on defendant's omission of duty, in neglecting to treat a hired slave with proper care and attention during the term, the consideration and terms of the contract of hiring need not be alleged; and if alleged, they need not be proved as averred. Moseley v. Wilkinson, 411

5. In an action on the case for damages to plaintiff's mill privileges, by the diversion of the water, it is not necessary to aver the manner or the means of the diversion.—Stein v. Ashby, 521

6. It is sufficient, in such an action, to aver injury to plaintiff's mill privileges, without alleging the existence of a mill. The gist of the action being the invasion of the right, there need be no actual damage, when the act complained of is of such a character that its repetition or continuance might become the foundation of an adverse right. 521

CERTIORARI.

1. Two distinct final orders or decrees of the Commissioners' Court, one establishing a road, and the other granting a license to keep a ferry, cannot be taken to the Circuit Court by one writ of *certiorari*, although the ferry is a part of the road.—Creswell and Monette v. The Commissioners' Court of Greene County, 282

2. A *certiorari* cannot be awarded to bring up an amended record, unless by consent, until the amendment has been made in the court below.—Townsend et al. v. Jeffries' Adm'r, 329

3. Three several judgments rendered by a justice of the peace, in cases between different parties, cannot be removed to the Circuit Court by one writ of *certiorari*, sued out by a party who was a defendant in each case.—Davis v. Calhoun, 437

4. When a cause is removed to the Circuit Court by *certiorari*, it should not there be dismissed on account of a defect in the bond, unless the appellant fails or refuses, when required, to make a good one.—Davis v. Calhoun, 455

CHAMPERTY.

1. P., having traded horses with M., claimed of the latter $20 for cheating him; he afterwards sold the horse which he obtained by the exchange to W., and it was agreed between them that P. should sue M. for the $20; that W. should have the recovery if he succeeded, and should pay all costs if he failed; judgment for cost having been finally rendered against P., W. promised the clerk of the court that he would pay them; but having failed to do so, P. paid the costs, and then sued W. to recover them: *Held*, that the contract was champertous, and that W.'s promise to the clerk did not aid plaintiff.—Wheeler v. Pounds, 472

CHANCERY.

1. An absolute bill of sale of a slave decreed to stand only as a mortgage, upon proof that the vendor was upwards of seventy years old,—infirm,—embarrassed,—his property levied on, and about to be sold,—and that the vendee, who was his son-in-law, took advantage of all these circumstances to make the transaction assume the form of an absolute sale instead of a mortgage.—Smith et al. v. Pearson, 355
2. Equity will afford specific relief, such as a court of law cannot give, against an instrument which was executed on Sunday, but purporting on its face to have been executed on Saturday, notwithstanding the instrument may also be void at law. 355
3. The statutory remedy by motion to supersede an execution on a judgment, does not deprive the Chancery Court of its original jurisdiction to remove a cloud upon the title to land; and therefore a vendee, whose land has been sold under execution (issued on a judgment recovered against his vendor before his purchase), and bought in by himself, may come into equity to enjoin the collection of his bid and all further proceedings under the judgment, upon an allegation that the judgment had been paid and satisfied before the issue of the execution.—Brewer v. Branch Bank at Montgomery, 439
4. A mail-contractor cannot come into equity to enforce a contract with a plank-road company for the transportation of the mail over its road, unless he shows by his bill that a court of law could not compensate him in damages for the breach of the contract.—Powell v. Central Plank Road Company, 441
5. The rule as to contradicting or varying a written instrument by parol proof, obtains with the same force in equity as at law. Therefore, where a written contract recited that the purchase money was to be paid on a specified day, and that the vendor was to make titles when the purchase money was settled with him, and no fraud or mistake in its execution was alleged, it was held, that the terms of the contract could not be varied, in equity, by proof of a contemporaneous parol agreement that the purchase money was not to be paid on the day specified, but was to await a settlement of accounts between the parties.—Ware v. Cowles, 446
6. A vendee may come into equity, to enjoin a judgment at law on the notes given for the purchase money, upon alleging the vendor's fraudulent representations of title in himself, a breach of his warranty of title, and the insolvency of his estate.—Walton, adm'r v. Bonham et al., 513

CHANCERY—CONTINUED.

7. A trustee in a deed, who is also the principal beneficiary, may come into equity, on behalf of himself and the other beneficiaries of the deed, to prevent a sale of the property under executions and attachments at law, to foreclose the deed, and to settle the conflicting liens. Such a bill is properly filed, not only as preventing a multiplicity of suits, and removing a cloud upon the title to the property, but also upon the well settled ground that a mortgagee, although he has a power of sale, may foreclose in equity.—Alabama Life Insurance and Trust Company v. Pettway, 544

CHANCERY PLEADING AND PRACTICE.

1. In a contest in equity among several creditors of an insolvent partnership, for the marshalling of its assets and the settlement of their respective liens, a creditor who was not made a party to the original bill may be brought in as a defendant to a cross bill.—Coster's Ex'rs v. Bank of Georgia et al. 37
2. Where non-resident infants are necessary parties to a bill, the record must show that publication as to them was made in the manner prescribed in the third and forty-first rules of our Chancery Practice. 37
3. In a case of interpleader, after the discharge of the complainant, the testimony having been published by consent without prejudice, it is discretionary with the Chancellor to permit an amendment of one of the answers.—Lanier v. Driver, 149
4. Where the bill alleges a negative—that defendant, who was complainant's agent to sell, became himself the purchaser *without* complainant's consent—which the answer denies, and alleges the reverse affirmative to be true—that defendant became the purchaser *with* complainant's consent—the affirmative allegation of the answer is not responsive to the bill, but must be proved by defendant to make out his defence.—Walker v. Palmer, 358
5. The appeals spoken of in sections 3019 and 3020 of the Code, are appeals from final judgments or decrees, and not from those which are interlocutory only.—Powell v. Central Plank Road Co., 441
6. The register has power, under the Code, to grant an appeal from an interlocutory order of the Chancellor dissolving an injunction in vacation (LIGON, J., *dissenting*). 441
7. Where a bill is filed against an executor to compel a settlement and account of his trust, and to have complainant's portion of the estate (she being a married woman, and her husband insolvent) settled to her separate use, if the bill alleges that certain slaves in the defendant's possession were purchased with the funds of the estate, while the proof shows that they were purchased with his own individual funds, but under such circumstances that a court of equity would consider them assets of the estate, there is no fatal variance between the allegations and proof.—Montgomery v. Givhan et al., 568
8. When an admission of record is made by counsel in the court below, for the purpose of obviating the necessity of proof, it will be pre-

CHANCERY PLEADING AND PRACTICE—CONTINUED.

sumed that he had authority to make it, and the admission cannot be withdrawn in the appellate court. 568

9. A final decree of the Chancery Court, which has been fully executed, cannot be opened on the petition of one who, by his own showing, had no interest whatever in the subject-matter of the controversy until long after it was terminated.—Boykin v. Kernochan, 697

10. When a party propounds his interest by petition to the court, praying to be made a party to a suit that he may prosecute an appeal or writ of error from the final decree, the order making him a party would relate back to the time when the decree was rendered; and therefore, if his petition shows that an appeal or writ of error from the decree is already barred by the statute of limitations, it will not be granted. This rule applies equally to Chancery Courts and Courts of Probate. 697

11. Where a decree has been rendered against the corporate authorities of a city for the abatement of a public nuisance, on an information in the name of the State at the relation of certain citizens, any citizen may interfere as relator, by a proceeding in the nature of a bill of revivor, and call on the court to carry the decree into execution. The State, ex rel. Waring, v. The Mayor, &c., of Mobile, 701

12. Whether the statute requiring the revival of a judgment by a *scire facias* when no execution was issued within a year and a day after its rendition (Clay's Digest 206 § 28), applies to a decree in chancery for the abatement of a public nuisance, on information filed in the name of the State at the relation of certain citizens, *quære?* But if it does apply, its only effect is, to compel the party seeking to enforce the decree to proceed by bill of revivor or *scire facias*. 701

13. On a bill filed to enforce the execution of a decree, if the record shows sufficient to authorize an amendment of the decree *nunc pro tunc*, by reciting the fact that the defendant therein appeared although not served with process, the court will consider the amendment as made, and will sustain the former decree. 701

14. There are cases where a court of equity, on a bill filed to enforce the execution of a decree, will refuse to enforce the decree if it is unjust; but this will not be done when the proceeding is in the nature of a bill of revivor. 701

15. An amended bill, which is repugnant to the original bill, cannot be allowed. 712

16. A bill will not be dismissed without prejudice, when the complainant has had ample opportunity to hunt up his testimony and prepare his case on the merits.—Rumbly v. Stainton and Wife, 712

CIRCUIT COURT.

1. Under the act establishing Courts of Probate, the Circuit Court has power to make amendments *nunc pro tunc* of the judgments of the County Court, in causes transferred to the former court under that act.—Glass v. Glass, 468

CITY COURT OF MOBILE.

1. The City Court of Mobile has jurisdiction of an action on the case

CITY COURT OF MOBILE—CONTINUED.

to recover damages for the diversion of the water of a running stream to the injury of plaintiff's mill privileges.—Stein v. Ashby, 521

COMMISSIONERS' COURT.

1. Two distinct final orders or decrees of the Commissioners' Court, one establishing a road, and the other granting a license to keep a ferry, cannot be taken to the Circuit Court by one writ of *certiorari*, although the ferry is a part of the road.—Creswell and Monette v. The Commissioners' Court of Greene Co.. 282
2. To authorize any one to be made a party to proceedings before the Commissioners' Court for establishing a road, or granting a ferry license, he must have a private right, as an individual proprietor, which he can vindicate by suit; and the record must show his interest. 282

COMPTROLLER OF PUBLIC ACCOUNTS.

1. The Comptroller of Public Accounts, in this State, has no authority to receive payment of moneys due to the State; and a payment to him, being unauthorized and invalid, does not discharge the party making it from responsibility to the State.—Van Dyke v. The State, 81
2. A payment to the Comptroller, of moneys due to the State, can only be ratified by the sovereign power of the State: a suit cannot be instituted against him for its recovery, in the name of the State, by the direction of the Governor. 81
3. The amendment of the constitution, submitted to the vote of the people by the General Assembly of 1844-5, proposing *biennial* (instead of *annual*) elections of the State Treasurer and Comptroller, not having been properly ratified at the next session of the General Assembly, those officers hold their offices for the term of one year only.—Collier, Governor &c., v. Frierson et al., 100

CONSTITUTION.

1. The State constitution can only be changed by the people in convention, or in the mode prescribed in the instrument itself; and if the latter mode is adopted, every requisition of the constitution must be observed.—Collier, Governor &c., v. Frierson et al., 100
2. The amendment of the constitution, submitted to the vote of the people by the General Assembly of 1844—5, proposing *biennial* (instead of *annual*) elections of the State Treasurer and Comptroller, not having been properly ratified at the next session of the General Aesembly, those officers hold their offices for the term of one year only. 100
3. The General Assembly of 1844—5 having proposed several amendments of the constitution, joint resolutions were adopted at the next succeeding session, reciting in the preamble that, "whereas the General Assembly of this State, at the last session of the same, duly submitted to the people of said State proposed amendments to the constitution; and whereas the people of this State, in manner and form as provided by the constitution, have accepted the said amendments, which are in words and figures following," &c., set-

CONSTITUTION—Continued.

ting them all out except one, which was entirely omitted; and the usual clause was then added, enacting "that the aforesaid amendments to the constitution, proposed as aforesaid, and accepted by the people as aforesaid, be ratified, and that the same, from and after the passage of this resolution, be and form a part of the constitution of the State of Alabama": *Held*, that the amendment which was entirely omitted from the ratifying resolutions, was not constitutionally ratified, and therefore failed. 100

4. The case of Trotter v. Blocker and Wife, 6 Porter 268, overruled, as to the principle stated in the first clause of the fifth head-note, which asserts that the constitutional delegation of authority to the Legislature "to pass laws to permit the owners of slaves to emancipate them," "*is equivalent to a positive inhibition of the right of the owner to emancipate them except only under such regulations as the Legislature may prescribe.*"—Prater's Adm'r v. Darby, 496

5. The only legitimate object of taxation is, the support and maintenance of the government; but this does not mean the expenses incurred by the mere machinery necessarily employed in its administration and conduct: the power extends to the employment of all those means and appliances which are ordinarily adopted, or which may be calculated, to develop the resources of the State, and add to the aggregate wealth and prosperity of her citizens; such, for example, as providing outlets for commerce, opening up channels of intercommunication between different parts of the State, improving the social, moral and physical condition of her people by wholesome police regulations, and by a judicious system of public instruction, as also for the protection, security and perpetuity of her government and institutions.—Stein v. The Mayor, &c., of Mobile, 591

6. The power to levy a tax for local purposes may be delegated by the Legislature to a municipal corporation; it is no objection to an act delegating such power, that it requires the assent of three-fifths of the tax-payers to be obtained before the tax is levied; and the fact that the railroad, to aid in the construction of which the tax is imposed, extends beyond the limits of the city, or even of the State, does not render it less local, or in any way affect the validity of the statute or of the tax. 591

7. The acts of January 5, 1850, and December 20, 1851, authorizing the corporate authorities of the City of Mobile to levy a tax on the owners of real estate in the city, to aid in the construction of the Mobile and Ohio Railroad, are not unconstitutional. 591

8. The fifth article of the amendments to the constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury," does not restrict the States, in the prosecution of capital or infamous crimes, to the common law indictments. Those amendments were demanded by the States as safe-guards against encroachments on the part of the Federal Government, and were not designed to restrict their own powers.—Noles v. The State, 672

9. The tenth and twelfth sections of the first article of our State con-

CONSTITUTION—Continued.

stitution do not restrict the powers of the Legislature to enact laws defining offences and their punishment, and prescribing the forms of indictments suited to them as well as the mode of trying them. If the form of indictment prescribed by the statute contains such an accusation, at the suit of the State, found to be true by the oaths of a grand jury, as furnishes to the accused reasonable information of what he is called on to answer, by setting forth the constituent elements of the offence, it will be sufficient, although it omits many averments which, at common law, were necessary to the validity of an indictment. 672

10. It was competent for the Legislature, by statute, to dispense with the averment, in an indictment for murder, that the offence was committed within the body of the county in which the indictment was found, and to require that fact to be shown by the evidence. 672

CONTRACTS.

1. If one contracts to serve another for one year, at a stipulated sum payable monthly, and is discharged, without any fault on his part, before the expiration of the year, he may treat the contract as not subsisting, and sue in assumpsit for wages due according to its terms, or he may consider it rescinded, and sue for unliquidated damages for its breach; if he sue on the contract, he can only recover the wages due by its terms before the institution of the suit; if for damages for breach of contract, he is entitled to recover the actual damage sustained up to the trial; but the sum specified in the contract would not, of itself, be the exact measure of such actual damage.—Fowler & Prout v. Armour, 194

2. If a slave is hired for a particular service, and is afterwards employed in a different one, this is a conversion for which the owner may bring trover, and recover the value of the slave with interest from the time of conversion; but if, with full knowledge of the conversion before the expiration of the term, he receives the stipulated hire for the entire term, he is estopped from afterwards bringing trover.—Moseley v. Wilkinson, 411

3. If the owner take possession of a hired slave, when there has been no violation of the contract on the part of the hirer, he loses his right to hire; if he refuses to deliver the slave on demand, the fact that he afterwards sends him away alone, with directions to return to the hirer (which instructions the slave disobeys, and runs away), does not excuse the refusal.—McNeill & Furniss v. Easley, adm'r, 456

4. Defendant in execution agreed to pay, in compromise and satisfaction of the judgment against him, a certain sum in money and the costs of a claim suit then pending; but when the suit was called in court the next morning, he refused to pay or to confess judgment for the costs, and denied that he had promised to do so; the suit was not then dismissed, but at a subsequent term a trial was had, which resulted in a verdict for the claimant; plaintiff in execution having paid the costs, and brought suit on the contract, the court charged the jury, "that if defendant, in consideration of plaintiff's entering satisfaction of the judgment, or with a view to benefit the

CONTRACTS—Continued.

claimant, undertook to pay said costs, and, when the cause was called up, refused to bind himself therefor, the plaintiff was entitled to recover the costs which had accrued up to the time he so refused:" *Held*, that there was no error in the charge of which defendant could complain.—Salmons v. Roundtree, 458

5. P., having traded horses with M., claimed of the latter $20 for cheating him; he afterwards sold the horse which he obtained by the exchange to W., and it was agreed between them, that P. should sue M. for the $20; that W. should have the recovery if he succeeded, and should pay all costs if he failed; judgment for cost having been finally rendered against P., W. promised the clerk of the court that he would pay them; but having failed to do so, P. paid the costs, and then sued W. to recover them: *Held*, that the contract was champertous, and that W.'s promise to the clerk did not aid plaintiff —Wheeler v. Pounds, 472

6. A written order, addressed to a mercantile firm, in these words: "Please let the bearer, Mr. O., have any little things he may stand in need of, and I shall be good for the same," held to be a direct, original undertaking, which would continue until revoked, or until the account was closed, and would embrace any articles, of no great value, which would come under the denomination of necessaries for a person in O.'s condition.—Scott v. Myatt & Moore, 489

7. No notice of acceptance, or demand of payment, before suit brought, is necessary to charge one on whose written order (a direct, original undertaking) goods are furnished to another. 489

8. Evidence that the goods were charged on the merchant's books to the person to whom they were furnished, and that he afterwards settled the account, by paying a part in cash, and giving his note for the balance, is proper for the consideration of the jury, in determining whether the credit was given to him; but if the goods were sold on the faith of the written order, the rights and liabilities of the parties must be determined by it, and would not be affected by the fact that the merchant treated it as a collateral, instead of a direct undertaking, or that he charged the goods to the person who obtained them. 489

9. An absolute bill of sale of slaves, and a bond executed contemporaneously by the vendee (to his vendor) conditioned that he shall emancipate them, must be considered together as forming but one agreement.—Prater's Adm'r v. Darby, 496

10. The owner of certain slaves, being about to remove with them to Illinois for the purpose of emancipating them, conveyed them by absolute bill of sale to another, and took from him at the same time a bond, conditioned that he should emancipate them when reasonable compensation had been made to him for his trouble and expenses with them: *Held*, that inasmuch as there was nothing on the face of the bond requiring the obligor to emancipate the slaves in this State, his undertaking was not void, but formed a sufficient consideration for the bill of sale. 496

CORPORATIONS.

1. When the act incorporating the municipal authorities of a city makes it their duty to keep in repair the bridges and streets within the corporate limits, and in consideration thereof relieves them from other duties, an action on the case lies against them for a neglect of this duty, in favor of a person who is thereby injured.—Smoot v. The Mayor, &c., of Wetumpka, 112
2. A legislative grant to an incorporated company, conferring upon them "the exclusive right and privilege of conducting and bringing water for the supply of the city for the term of forty years," gives them no right to divert the water of a running stream, to the injury of riparian proprietors, without making compensation.—Stein v. Burden, 130
3. A municipal corporation, owning lands on a water course from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of the other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants. 130
4. An incorporated town retains its corporate capacity until its charter is declared forfeited in a direct judicial proceeding: it cannot be held, in any collateral proceeding, to have forfeited its charter by non-user.—Harris et al. v. Nesbit, 398
5. The power to levy a tax for local purposes may be delegated by the Legislature to a municipal corporation.—Stein v. The Mayor, &c., of Mobile, 591
6. Where a municipal corporation is purely political in its character, and intended solely for the local government of a city, its charter may be amended, and its name changed, while the corporation itself remains the same.—The State, ex rel. Waring, v. The Mayor, &c., of Mobile, 701
7. Where a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers upon it under a new name, and with additional powers, the latter act does not repeal the former. 701

COSTS.

1. In a case of assault and battery, fourteen witnesses were summoned by the State to sustain the character of the prosecutor, but none of them was called on the trial, the prosecutor having died two or three months previous thereto: *Held*, that the defendant, having been convicted, should be taxed with the costs of their attendance, it not being shown that they were summoned after the death of the prosecutor, nor that his death was known to the solicitor.—Barrett v. The State, 74

COURT AND JURY.

1. When the bill of exceptions does not set out all the evidence, the Appellate Court will not presume that an affirmative charge was abstract, but, on the contrary, that it was fully warranted by the proof.—McElhaney v. The State, 71
2. The practice of admitting illegal evidence, and afterwards excluding it, is improper, because of the difficulty of eradicating from the

COURT AND JURY—CONTINUED.

minds of the jury the impression which the evidence may have made; but, where the record shows a clear and unequivocal charge, withdrawing and excluding such evidence from the consideration of the jury, its admission is, at most, error without injury.—Florey's Executor v. Florey, 241

3. Defendant in execution agreed to pay, in compromise and satisfaction of the judgment against him, a certain sum in money and the costs of a claim suit then pending; but when the suit was called in court the next morning, he refused to pay or confess judgment for the costs, and denied that he had promised to do so; the suit was not then dismissed, but at a subsequent term a trial was had, which resulted in a verdict for the claimant; plaintiff in execution having paid the costs, and brought suit on the contract, the court charged the jury, "that if defendant, in consideration of plaintiff's entering satisfaction of the judgment, or with a view to benefit the claimant, undertook to pay said costs, and, when the cause was called up, refused to bind himself therefor, the plaintiff was entitled to recover the costs which had accrued up to the time he so refused": *Held*, that there was no error in the charge of which defendant could complain.—Salmons v. Roundtree, 458

4. A party cannot complain of a charge, which, when construed with reference to the evidence, is too favorable to him, or is without injury. 458

5. When the bill of exceptions sets out all the evidence, an erroneous affirmative charge, which is shown to be abstract, furnishes no ground of reversal. 458

6. In *assumpsit* for breach of warranty of the soundness of a horse, which became blind within a month after the sale, a charge based upon the condition of his eyes at the time of sale, is abstract, when the only evidence before the jury relates to their condition a month previous to that time.—Brown v. Jones, 463

7. The statute authorizing the summoning of a jury to try any question of fact touching the validity of a will (Clay's Digest, 304, § 35), vests in the court trying the issue a more enlarged discretion than is ordinarily exercised by courts in trying issues in civil causes.—Ex parte Edward Henry, 638

8. The validity of a will of realty and personalty was contested on three grounds, viz., because it was not signed by the subscribing witnesses in the presence of the testator; because the testator, at the time of its execution, was of unsound mind and memory; and because it was procured by fraud and undue influence on the part of the testator's wife; the jury having returned a verdict finding it invalid generally, the court, on motion of the contestant, inquired on what ground their verdict was predicated, to which one of their number replied, "principally on the ground that it was not signed in the presence of the testator"; and the court then ordered them to retire and find another verdict: *Held*, that the contestant could not have a *mandamus* for judgment on this first verdict. 638

9. Where a verdict, finding the will invalid, is rejected by the court on the motion of the contestant himself, he cannot afterwards have a *mandamus* for judgment on it. 688

COURT AND JURY—Continued.

10. Where the jury return a general verdict finding the will invalid, but state to the court that their verdict is not predicated on any one of the grounds of contest, and that they cannot agree upon any one of them, their verdict may be rejected. 638
11. A charge, when asked by either party, or affirmatively given by the court, should be so framed as not to exclude from the consideration of the jury any portion of the evidence which might exert an influence over their verdict.—Reese v. Beck, ex'r &c., 651

CRIMINAL LAW.

1. In a case of homicide, to justify the killing, it is not sufficient that the deceased had the means at hand to effect a deadly purpose, but he must have indicated, by some act or demonstration, at the time of the killing, a present intention to carry out such purpose, thereby inducing a reasonable belief on the part of the slayer that it was necessary to deprive him of life to save his own; and if the evidence shows no such act or demonstration, no question on the law of self-defence arises.—Harrison v. The State, 67
2. If one man deliberately kill another, to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder. 67
3. When an indictment charges the defendant with "harboring *and* concealing" a runaway slave, he may be convicted on proof of either harboring *or* concealing.—McElhaney v. The State, 71
4. The terms "harbor" and "conceal," as used in the fourteenth section of the fourth chapter of the Penal Code (Clay's Digest 419 § 14), are descriptive of two offences: a person may be convicted of "harboring," on proof that he, knowing the slave to be a runaway, fed her, or furnished her with shelter and the like, to enable her to remain away from her master, or to deprive her master of her service, although he may not have "concealed" her. 71
5. In a case of assault and battery, fourteen witnesses were summoned by the State to sustain the character of the prosecutor, but none of them was called on the trial, the prosecutor having died two or three months previous thereto: *Held*, that the defendant, having been convicted, should be taxed with the costs of their attendance, it not being shown that they were summoned after the death of the prosecutor, nor that his death was known to the solicitor.—Barrett v. The State, 74
6. Under an indictment for selling spirituous liquors to a free person of color, the State may prove the *status* of the person to whom the liquor was sold by evidence of hearsay and general reputation.—Tucker v. The State, 77
7. An administratrix who has possession of a slave belonging to her intestate's estate, is his mistress, within the purview of the statute against selling or delivering spirituous liquors to a slave without an order in writing signed by his "master or overseer."—Boltze v. The State, 89
8. An order in writing signed by a person who is neither the master nor overseer of the slave to whom the liquor was sold, is no protection to the seller. 89

CRIMINAL LAW—CONTINUED.

9. Under a count in an indictment for gaming, charging the defendant with playing cards "at a storehouse then and there for retailing spirituous liquors," no conviction can be had, upon proof that the playing took place "near a house formerly used for retailing, but which was not then so used."—Logan v. The State, 182
10. Where the accused may be convicted, under the indictment, of murder in the first degree, he is entitled to the number of peremptory challenges allowed in prosecutions of that offence; and it is, therefore, no objection to the form of indictment prescribed by the Code (p. 698), that it does not distinguish between the different degrees of murder.—Noles v. The State. 672
11. The fifth article of the amendments to the constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury," does not restrict the States, in the prosecution of capital or infamous crimes, to the common law indictments. Those amendments were demanded by the States as safe-guards against encroachments on the part of the Federal Government, and were not designed to restrict their own powers. 672
12. The tenth and twelfth sections of the first article of our State constitution do not restrict the powers of the Legislature to enact laws defining offences and their punishment, and prescribing the forms of indictments suited to them, as well as the mode of trying them. If the form of indictment prescribed by the statute contains such an accusation, at the suit of the State, found to be true by the oaths of a grand jury, as furnishes to the accused reasonable information of what he is called on to answer, by setting forth the constituent elements of the offence, it will be sufficient, although it omits many averments which, at common law, were necessary to the validity of an indictment. 672
13. It was competent for the Legislature, by statute, to dispense with the averment, in an indictment for murder, that the offence was committed within the body of the county in which the indictment was found, and to require that fact to be shown by the evidence. 672
14. The caption of an indictment, showing when, where, and by whom the court was held, and who were elected and sworn as grand jurors, may be looked to, in aid of the indictment, as a part of the record. 672
15. A verdict *finding the prisoner guilty of murder in the first degree, and sentencing him to be hung*, is sufficient to authorize a judgment of conviction and sentence of death. 672
16. The date of the sentence and day of execution may be expressed in figures, instead of letters. 672
17. An affidavit by a married woman, that "she *is afraid* her husband will beat, wound, maim, or kill her, or do her some bodily hurt," is not sufficient to authorize the arrest of the husband (Code, §§ 3340, 3341); and if the warrant of the justice appears on its face to be predicated on such an affidavit, it is void, and furnishes no protection to the officer executing it. 672

DAMAGES.

1. In an action against the owners of a steamboat to recover damages for the loss of a slave, who was hired as a deck hand on the boat, and was killed in consequence of a collision with another boat occasioned by the negligence and want of skill of the former's officers, one of the part-owners acting as captain at the time of the collision, evidence of his general reputation as a steamboat captain is admissible, as tending to prove notice of his incompetency to the defendants.—Cook & Scott v. Parham, 21
2. In such an action, a witness for plaintiff was asked "what was the general reputation of said defendant as a steamboat captain," and answered "that he had no reputation. for the reason that he had no experience, and that he regarded him as wholly incompetent for such a duty: *Held*, that the question and answer were admissible. 21
3. The owners of the boat would be responsible for the loss of the slave, if his death was the legitimate and natural consequence of the collision, and the collision was caused by the negligence of the defendants; and if his death was occasioned by his own act in leaping into the river, when frightened out of his ordinary presence of mind by the excitement, confusion and danger caused by the collision, it would be the legitimate consequence of that collision. 21
4. It is the duty of the owners to use due care in providing competent officers for the boat, and the bailor may hold them responsible for the neglect of this duty, although he had the means of knowing the officers' characters for care and skill when he hired his slave to them. 21
5. Where two persons are employed in the same general business by a common employer, if one is injured by the negligence of the other, the employer is not responsible (*per tot. cur.*); but whether this rule applies to owners of a steamboat, when sued for the loss of a slave who was hired as a deck hand on the boat, and whose death was caused by a collision occasioned by the carelessness of the captain, who was one of the owners, *quere?* (Chief Justice Chilton and Justice Ligon holding the negative, and Justices Goldthwaite and Phelan the affirmative.) 21
6. If the collision was caused by the negligence or fault of the pilot, and the owners had the means of knowing that he was careless and reckless, they are responsible for the injury. 21
7. When the act incorporating the municipal authorities of a city makes it their duty to keep in repair the bridges and streets within the corporate limits, and in consideration thereof relieves them from other duties, an action on the case lies against them for a neglect of this duty, in favor of a person who is thereby injured.—Smoot v. Mayor, &c., of Wetumpka, 112
8. A count averring that the bridge was private property, not belonging to the corporation, and had become a public nuisance from its unsafe and rotten condition, and that said corporation, knowing this, failed to abate it, as they by law were authorized and required to do, whereby &c., is bad on demurrer; the failure to exercise judicial power properly, in the absence of malice and corrupt intention, constitutes no ground of action. 112

DAMAGES—CONTINUED.

9. A legislative grant to an incorporated company, conferring upon them "the exclusive right and privilege of conducting and bringing water for the supply of the city for the term of forty years," gives them no right to divert the water of a running stream, to the injury of riparian proprietors without making compensation.—Stein v. Burden, 130
10. An act authorizing the lessee of certain water works to sue out a writ of *ad quod damnum*, to ascertain the damage sustained by riparian proprietors from his diversion of the water of a running stream, does not deprive a riparian proprietor of his common law action for damages, on the lessee's failure to sue out the writ. 130
11. A witness who is well acquainted with the mill business, cannot give his opinion as to the damage sustained by plaintiff by a diversion of the water from his mill, when he is not informed of the size of the stream, its supply of water, or the quantity diverted. 130
12. No recovery can be had, except by a new action, for damages accruing subsequent to the commencement of the suit; but evidence is admissible to show the effect after suit brought of a diversion of the water, with the view of affording information to the jury of the effect of the diversion under similar circumstances before suit brought. 130
13. Actual possession under claim of title is sufficient to sustain an action on the case for diverting water from a mill; and therefore evidence showing that plaintiff had no title to the land on which the mill was situated, is inadmissible. 130
14. A riparian proprietor is entitled to nominal damages for a diversion of the water from his mill, without any proof of actual damage. 130
15. When justification and the general issue are pleaded to an action of slander, if defendant fails to establish the former plea, it may be considered by the jury in aggravation of damages.—Robinson v. Drummond, 130
16. In an action on a detinue bond, counsel fees for defending the suit in the Circuit Court are recoverable; but counsel fees for defending in the Supreme Court, to which the case was removed by the plaintiff below, cannot be recovered. (GOLDTHWAITE, J., *dissenting. held*, that counsel fees for defending in both courts should be allowed.)—Ferguson and Scott v. Baber's Adm'rs. 402
17. If an infant disaffirm his contract of sale on arriving at full age, and sue his vendee for use and occupation, the latter may recoup for valuable improvements erected on the land.—Weaver v. Jones, 420
18. A writ of *ne exeat* was granted in a chancery cause, upon complainants' entering into bond conditioned that they should "prosecute their said bill and writ to effect," or, failing therein, should pay to the defendant all such costs and damages as he might "sustain from the wrongful filing of said bill, or the wrongful suing out of said writ of *ne exeat*." The defendant having brought suit on the bond, *it was held*, that, although the condition of the bond was not complied with by merely prosecuting the bill to effect, yet an order discharging the defendant from custody under the writ, upon his delivering up to complainant certain slaves in his possession, was not such a failure to prosecute said writ to effect, as would entitle the defendant to maintain an action on the bond for damages.—Spivey v. McGehee et al., 476

DAMAGES—Continued.

19. In an action on the case for damages to plaintiff's mill privileges, by the diversion of the water, it is not necessary to aver the manner or the means of the diversion.—Stein v. Ashby, 521
20. It is sufficient, in such an action, to aver injury to plaintiff's mill privileges, without alleging the existence of a mill. The gist of the action being the invasion of the right, there need be no actual damage, when the act complained of is of such a character that its repetition or continuance might become the foundation of an adverse right, 521

DEBTOR AND CREDITOR.

1. A deed of trust held not to be fraudulent on its face, which was made without the knowledge of the preferred creditor, whose debt was past due, and reserved to the grantor the use of the property until the creditor ordered a sale.—Lanier v. Driver, 149
2. The actual assent of a beneficiary is not required to a deed of trust which is clearly for his benefit. 149
3. Where a debtor executes two deeds of trust at different times, the beneficiaries in the second deed may enforce the execution of the trust after the law day of their deed, and therefore cannot complain of the negligence of the others after that time. 149
4. If a debtor, in failing circumstances, executes a deed of trust to secure some of his creditors, and, with the intent of saving a portion of the property to himself, fails to disclose the indebtedness of one of the secured creditors to him on another transaction, this would be a fraud upon his creditors, as against any one who, by assenting to the intent, participated in the fraud.—Ala. Life Ins. & Trust Co. v. Pettway, 544
5. If a creditor, knowing the insolvency of his debtor, takes from him a deed of trust to secure the entire amount of his debt, without disclosing the fact that he is indebted to the grantor on another transaction not noticed in the deed, this would be a strong circumstance against him, and would probably be conclusive if the indemnity provided was fully adequate to the secured debt; but, if the mortgaged property was insufficient to pay the secured debts, by an amount exceeding the creditor's indebtedness to the grantor, or if there were other debts or liabilities not provided for by the deed, exceeding the creditor's said indebtedness, this would be sufficient to rebut every inference of fraud or dishonesty. 544

DEEDS AND CONVEYANCES.

1. An unrecorded mortgage is void, under the acts of 1823 and 1828, as to a subsequent mortgagee without notice, although his deed is also unrecorded.—Coster's Ex'rs v. Bank of Georgia et al., 37
2. An instrument, in form a deed, containing a clause of warranty, attested by two witnesses, and conveying realty and personalty by the words "at my death I do hereby give and grant unto my son," *held* a deed, and not a will; the evidence showing that it was delivered to the grantee, who was a cripple, on the day of its date, and that it was intended as a present provision for him, to induce him to continue to live with the grantor, his mother.—Golding v. Golding's Adm'r, 122
3. A deed which is void as to third persons on account of an adverse

DEEDS AND CONVEYANCES—CONTINUED.

holding, is nevertheless valid and binding as between the parties themselves; and the fact that the vendee was in possession, as tenant of the adverse holder, does not affect the principle.—Abernathy v. Boazman, 189

4. In an action for a breach of covenant of title, evidence that the vendee himself was in possession, as tenant of an adverse holder, at the time his deed was executed, is not admissible for the vendor: the fact that both parties knew of the adverse holding, and that there was no fraud, does not relieve the vendor from the liability to make good his covenant. 189

5. An absolute bill of sale of a slave is not required to be recorded, although there is a contemporaneous agreement for the delivery of the slave at a future day.—Millard's Adm'rs v. Hall. 209

6. One who is in possession of lands under a deed purporting to convey them to him, especially when livery of seizin accompanied the delivery of the deed, has color of title, and may, when sued in trespass by a patentee from the United States, contest the validity of plaintiff's patent.—Saltmarsh et al. v. Crommelin, 347

7. Where a plaintiff claims under an absolute conveyance in fee from defendant, parol evidence of a contemporaneous verbal agreement for the retention of possession by the defendant until he had made another crop on the land, varies the legal effect of the deed, and is therefore inadmissible.—Melton v. Watkins, 433

8. Certain boundaries are of more importance than quantity in designating lands. Therefore, where a patent calls for a sub-division of a fractional quarter section, described as lying north of a certain creek and containing a specified number of acres, it embraces all the land in the sub-division north of the creek, although the actual number of acres exceeds the number specified in the patent.—Stein v. Ashby, 521

DEEDS OF TRUST.

See FRAUDULENT CONVEYANCES.

DEBTOR AND CREDITOR.

DEPOSITIONS.

1. When a deposition shows on its face that the commissioner by whom it was taken was not very expert in such matters, the court will look to this circumstance in gathering the meaning of the witness from the inapt expressions used.—Nelson v. Iverson. 9

2. The objection that an answer is not responsive to the interrogatory, comes too late at the trial. 9

3. If a party fails to object to an interrogatory which asks for a conclusion of law, he cannot object to the answer, if it is responsive.—Townsend et al. v. Jeffries' Adm'r, 329

4. It is no objection to a deposition taken on interrogatories, that in stating the name of the case in the commissson, the plaintiff is represented as suing individually, instead of as executor; the commission, in such case, may be amended by the interrogatories.—Reese v. Beck, ex'r, &c., 651

DEPOSITIONS—CONTINUED.

5. The deposition of a witness may be taken, on the affidavit of the attorney of the party wishing it that the witness is unable to attend court because of sickness and great bodily infirmity. 651
6. Where notice of the taking of a deposition on interrogatories is addressed to the attorneys at law, by their firm name (without stating that they are attorneys at law), by whom the declaration was filed, it will be presumed, in the absence of any denial on their part, to have been addressed to them in the same character in which they filed the declaration; and if the notice is executed by the sheriff on a person bearing the same name with one of the partners of the firm, it will be presumed that the sheriff did his duty, and that the person on whom the notice was served was a partner of the firm. 651
7. When a deposition is taken in strict conformity to the statute, in every particular, except that the commissioner neglects to attach his seal to his certificate, an objection to its regularity comes too late at the trial. 651

DETINUE.

1. If an administrator in chief make a loan or gratuitous bailment of a slave belonging to the estate, both he and his bailee are guilty of a conversion; but the administrator himself cannot avoid the bailment, nor sue for the recovery of the property.—Lawson's Adm'r v. Lay's Ex'r, 184
2. The statute of limitations begins to run in favor of the loanee or gratuitous bailee of the administrator in chief, from the time of the appointment of an administrator *de bonis non.* 184
3. If the loanee of the administrator marry, and her husband come into possession of the slave, he is liable for damages in detinue, both for his own detention and that of his wife before marriage. 184
4. And if he die before suit brought, and the slave come to the possession of his executor as assets, the latter is liable for his own detention and that of his testator, and no demand is necessary. 184
5. A release from a stranger, or a transfer of all his interest in the property, is admissible evidence for the defendant in detinue, as tending to show title in himself.—Slaughter v. Cunningham, 260
6. In an action on a detinue bond, counsel fees for defending the suit in the Circuit Court are recoverable; but counsel fees for defending in the Supreme Court, to which the case was removed by the plaintiff below, cannot be recovered. (GOLDTHWAITE, J., *dissenting, held,* that counsel fees for defending in both courts should be allowed.)—Ferguson and Scott v. Baber's Adm'rs, 402

DISCONTINUANCE.

1. A case having been taken from the Supreme Court of this State to the Supreme Court of the United States, the judgment was there reversed, and the cause remanded, but the certificate of reversal did not reach the former court until after the lapse of more than nine years: *Held,* that this did not operate a discontinuance of the cause.—Doe ex dem. Brown & Wife v. Clements & Hunt, 354

EJECTMENT.

1. An administrator of a solvent estate may, in this State, maintain ejectment for the land of his intestate.—Golding v. Golding's Adm'r, 122
2. After the rendition of a judgment in ejectment for the plaintiff, the parties entered into a written agreement, fixing a different boundary line from that ascertained by the judgment; at the bottom of this agreement was written, in the handwriting of the presiding judge, this memorandum: "The judgment heretofore rendered in this case is set aside, and the foregoing agreement;" and the agreement was entered on the minutes of the court at the same term: *Held*, that this was not sufficient evidence to authorize the rendition of a judgment *nunc pro tunc* at a subsequent term, and that the previous judgment was valid and subsisting.—Chighizola's Heirs v. Doe ex dem. Eslava, 237

ERROR.

1. When evidence is offered and admitted for a purpose for which it is inadmissible, its admission is not an error which will reverse, if the record also shows that it was admissible for another purpose; if the opposite party wishes to limit its effect, he must do so by requesting instructions to the jury.—Cook & Scott v. Parham, 21
2. When a general objection is made to an entire answer, a portion of which only is objectionable, it is not error to sustain the objection and exclude the whole answer.—Gibson v. Hatchett & Brother, 201
3. The erroneous exclusion of redundant evidence, is not available on error, as no injury results from it. 201
4. When the facts in evidence show a sufficient explanation of the vendor's retention of possession, the party alleging fraud cannot complain on error that the court referred to the jury the question of their sufficiency.—Millard's Adm'rs v. Hall, 201
5. When the record shows an error in the conditional admission of evidence, it must also show that the error was recited or cured by the introduction of the proper preliminary proof, or the judgment will be reversed: the Appellate Court will not presume that the error was corrected, or deprived of its injurious effects, because the bill of exceptions does not purport to set out all the evidence.—Moore v. Clay, 235
6. The practice of admitting illegal evidence, and afterwards excluding it, is improper, because of the difficulty of eradicating from the minds of the jury the impression which the evidence may have made; but, where the record shows a clear and unequivocal charge, withdrawing and excluding such evidence from the consideration of the jury, its admission is, at most, error without injury.—Florey's Executor v. Florey, 241
7. In debt on an administration bond, it is error to render judgment final against the principal and his sureties, without the intervention of a jury.—Amason et al. v. Nash, Judge &c., 279
8. Where the plaintiff's evidence is all set out in his bill of exceptions, and shows that he is not entitled to recover, the judgment in favor of the defendant will not be reversed, on error or appeal, no matter what may have been the rulings of the court below.—Jones v. Graham, 450

ERROR--CONTINUED.

9. A party cannot complain of a charge, which, when construed with reference to the evidence, is too favorable to him, or is without injury.—Salmons v. Roundtree, 458
10. In civil cases, no errors will be noticed which are not assigned.—Prater's Adm'r v. Darby, 496
11. The sustaining of a demurrer to a special plea, when the facts stated in it may be given in evidence under the general issue, is not an error for which the judgment will be reversed.—Stein v. Ashby, 521

ESCHEAT.

1. The property of a free negro, who dies intestate, escheats to the State, when there are no persons who can claim as heirs-at-law; and if the State, by act of the Legislature, afterwards relinquishes all its rights to the intestate's children, born of two female slaves with whom he cohabited, neither set of children is in a conditon to insist on the necessity of an inquisition to vest title in the State.—Malinda and Sarah v. Gardner, et al., 719
2. Slaves which have escheated to the State may be emancipated by an act of the Legislature, and the validity of the act can only be questioned by one who shows a right of property in himself. 719

ESTATES OF DECEASED PERSONS.

1. The statute which authorizes the slaves and servants of which a decedent was possessed at the time of his death, and which were employed in making a crop, to be continued on the plantation in his occupation at the time of his death, until the last day of December following, embraces all the plantations belonging to him and cultivated by him at that time.—Pinckard's Distributees v. Pinckard's Administrators, 250
2. Under this statute an administrator is authorized to furnish the widow and children of the decedent with all things necessary to their comfortable support, according to their respective condition and wants; but he must keep an account against each, to be charged upon his respective distributive share; and such expenses only as are indispensable to the cultivation of the plantation, are a charge upon the estate, to be deducted from the proceeds of the crops. 250
3. The domestic servants employed about the household at the time of the decedent's death, may be allowed to remain with his family until the end of the year, for their use, free of charge; the town residence of the family, and the plantation a few miles distant, constitute but one establishment. 250
4. The decedent having died in February, after he had commenced planting, his administrator kept up the plantation during the year, and made a crop: He was held entitled, on final settlement, to a credit for his expenses in going to Montgomery to sell the cotton belonging to the estate. 250
5. Two days' services of an auctioneer, in selling the property of the estate, held a proper charge against the estate on final settlement. 250
6. An administrator is entitled to a credit for reasonable counsel fees paid for prosecuting and defending the interests of the estate. 250

ESTATES OF DECEASED PERSONS—CONTINUED.

7. Also, to reasonable counsel fees for services rendered on final settlement with the Probate Court, although exceptions were sustained to several items in his accounts and vouchers. 250
8. Expense of repairs to household furniture belonging to the estate is properly allowed, when the value of the furniture is thereby increased to that extent. 250
9. Counsel fees paid for prosecuting the widow's right to dower, and her account for medical services rendered after her husband's death, are personal charges against her, and not against the estate. 250
10. Counsel fees paid for guardian *ad litem* for the minor heirs, are a personal charge against them, and not against the estate. 250
11. Five per cent. on the amount of the estate held a reasonable allowance to the administrator, where he had managed the plantation for nearly a year, and raised a crop; the value of the estate being about $25,000. 250
12. The allowance to an administrator of a credit for the cost of a tombstone erected over the deceased, must depend, in each case, upon the value of the estate and the desire of the deceased, as expressed by him orally or in his will. In a case where the estate amounted to about $8,000, and was bequeathed to collateral relations, the testator leaving neither widow nor children, the administrator was allowed a credit for $210, the cost of a marble tombstone, for which the testator had expressed a wish.—Bendall's Distributees v. Bendall's Administrator. 295
13. An administrator is not entitled on final settlement to a credit for counsel fees and cost paid by him in a chancery suit (which he had instituted against the legatees to restrain them from proceedings in the Court of Probate to compel a partial settlement of his administration), his bill having been dismissed for want of equity. 295
14. An administrator placed certain notes in the hands of his law partner for collection, who collected some of them by due course of law, filled up writs in other cases (but never issued them, or docketed the cases in court), and received the money from the debtors in all the other cases without suit. The court allowed him a credit for two and a half per cent. on the entire amount collected, for commissions paid to the attorney, and *it was held* no error of which the distributees could complain. 295
15. An administrator rightly allowed (*in this case*) a credit for $150, the amount of counsel fees paid by him to two attorneys for services rendered on his final settlement; the value of the estate being about $8,000, and the distributees contesting many of his accounts and vouchers, some of which were rejected. 295
16. Also, to five per cent. on the amount of his receipts as commissions, no wilful default or gross negligence being proved against him. 295
17. If an administrator wishes to discharge himself from the payment of interest, he should make the affidavit required by the statute when his account is stated by the court on the day of settlement; if the distributees are taken by surprise, the court may continue the cause, to give them an opportunity to examine into the facts and contest the affidavit. 295

ESTATES OF DECEASED PERSONS—Continued.

18. If the widow fails to present her claim for her distributive share of her deceased husband's estate to his personal representatives until after the estate has been finally settled by due course of law, her remedy against him and his sureties is gone, and she must follow the assets in the hands of the heir or distributee.—Turner et al. v. Cole, 364

19. A testator appointed his widow guardian of his minor children and executrix of his will, and directed the share of each child to be paid on its arriving at full age; a division of the estate was afterwards had between the widow and children, by persons duly appointed by the Orphans Court, but no settlement was made with the court; after the widow's death, her administrators were cited, by one of the testator's legatees, to settle her executorship, and also, by one of her distributees, to settle their administration on her estate: after due notice, all the parties in interest appeared, and "it was agreed that both estates should be blended and considered as one, as the parties in interest to both were precisely the same"; and a settlement was made, and a decree rendered accordingly: *Held*, on error assigned by the administrators, that the decree was erroneous, because the two estates could not be thus consolidated by the Probate Court.—Richardson's Administrators v. Richardson et al., 395

20. If the executor, in accounting on settlement with one distributee or legatee, has accounted for less than he might have been charged with, this does not give another legatee any right to a greater interest in the residue.—Montgomery v. Givhan et al. 568

ESTOPPEL.

1. If defendant's lot is in possession of a trespasser, or of one claiming title in himself or a third person, defendant is not liable for the erection or repairs of a partition fence; but if he consent, as owner, to the erection of the fence, and it is made by the adjoining proprietor upon the consent thus given, he is estopped from denying his liability.—Moore v. Levert, 310

2. When a person who is about to purchase a note given for the hire of a slave, applies to the maker for information concerning it, and is assured by the latter that he has no defence against it, this does not preclude the maker, when sued by the purchaser, from setting up a subsequent failure of consideration, arising out of the payee's conduct in receiving the slave, who ran away before the expiration of the term of hiring, and refusing to deliver him up on demand.—Maury v. Coleman, 381

3. If a slave is hired for a particular service, and is afterwards employed in a different one, this is a conversion for which the owner may bring trover, and recover the value of the slave with interest from the time of conversion; but if, with full knowledge of the conversion before the expiration of the term, he receives the stipulated hire for the entire term, he is estopped from afterwards bringing trover.—Moseley v. Wilkinson, 411

4. An act or admission, to conclude a party from afterwards asserting

ESTOPEL—CONTINUED.

a right, must be plainly inconsistent with that right, and must have been acted on by the other party; if it is susceptible of two constructions, one of which is consistent with that right, it forms no estoppel.—Ware v. Cowles, 446

5. When the property of the surety, by his consent, is sold under execution against his principal (the surety not being a party to the judgment), and is bought in by the principal, through an agent, and sent back to the surety's house, the principal, although he afterwards pays the debt under which the property is sold, cannot invoke the doctrine of estoppel to defeat the surety's title.—Pond v. Wadsworth, 531

6. The act of the agent, in sending the property back to the surety's house, where the principal also lived, if intended as a delivery to the principal, would vest the title in him by the delivery, and nothing could pass by a subsequent bill of sale to his administrator in trust for his estate; but the acceptance of such a bill of sale by the administrator would not preclude him from deducing title through his intestate under the previous sale consummated by delivery. 531

EVIDENCE.

1. When one party has adduced in evidence a part of a conversation, the other has the right to call for the whole of it.—Nelson v. Iverson, 9

2. In laying the predicate to impeach a witness, his attention having been directed to a conversation had by him twenty years before, "in the *spring* of the year," person and place being specified, evidence of contradictory statements made by him in *February* of that year, in a conversation otherwise corresponding with that laid, is admissible; the rule only requires that his attention should be directed with *reasonable certainty* to the time, place and person involved in the supposed contradiction. 9

3. In detinue for a slave, plaintiff claimed under a parol gift from his maternal uncle, and the character of his mother's possession (whether she held as guardian for her infant son, or under a loan as a nurse to herself) was disputed: *Held*, that her declaration, while in possession, that the slave belonged to her brother, was admissible evidence against the plaintiff. 9

4. In such case, evidence that plaintiff's grantor "was in the habit of controlling the slaves" while in possession of plaintiff's mother, is also admissible. 9

5. But evidence that the grantor "usually supplied her (plaintiff's mother) with a nurse, and when one became too large for that purpose, he would take it away and supply another," is not, of itself, admissible. 9

6. The declaration of a person while in possession of a slave, "that she was his, and he intended to keep her," is admissible evidence as explanatory of his possession; but a eclaration not connected with possession, is not admissible. 9

7. When the situation of a witness is such, that if a certain fact had existed he would probably have known it, his want of knowledge is

EVIDENCE—Continued.

some evidence, though slight, that it did not exist; and in such case, he will be allowed to state, that if the fact existed he did not know it. 9

8. Ownership is a fact to which a witness may testify. 9

9. In an action against the owners of a steamboat to recover damages for the loss of a slave, who was hired as a deck hand on the boat, and was killed in consequence of a collision with another boat occasioned by the negligence and want of skill of the former's officers, one of the part-owners acting as captain at the time of the collision, evidence of his general reputation as a steamboat captain is admissible, as tending to prove notice of his incompetency to the defendants.—Cook & Scott v. Parham, 21

10. In such an action, a witness for plaintiff was asked "what was the general reputation of said defendant as a steamboat captain," and answered "that he had no reputation, for the reason that he had no experience, and that he regarded him as wholly incompetent for such a duty: *Held*, that the question and answer were admissible. 21

11. When evidence is offered and admitted for a purpose for which it is inadmissible, its admission is not an error which will reverse, if the record also shows that it was admisible for another purpose; if the opposite party wishes to limit its effect, he must do so by requesting instructions to the jury. 21

12. A person acquainted with the navigation of the river, and a witness of the collision, may give his opinion as an expert whether the particular act which occasioned it was an act of prudence and discretion on the part of the officers. 21

13. Under an indictment for selling spirituous liquors to a free person of color, the State may prove the *status* of the person to whom the liquor was sold by evidence of hearsay and general reputation.—Tucker v. The State, 77

14. A witness who is well acquainted with the mill business, cannot give his opinion as to the damage sustained by plaintiff by a diversion of the water from his mill, when he is not informed of the size of the stream, its supply of water, or the quantity diverted.—Stein v. Burden, 130

15. No recovery can be had, except by a new action, for damages accruing subsequent to the commencement of the suit; but evidence is admissible to show the effect after suit brought of a diversion of the water, with the view of affording information to the jury of the effect of the diversion under similar circumstances before suit brought. 130

16. Actual possession under claim of title is sufficient to sustain an action on the case for diverting water from a mill; and therefore evidence showing that plaintiff had no title to the land on which the mill was situated, is inadmissible. 130

17. A witness may state that an aperture in a wall was visible from a certain point.—Gibson v. Hatchett & Brother, 201

18. A building having been consumed by fire, which entered through an aperture in one of the walls, a witness cannot state that the house might have been saved if the aperture had been closed. 201

19. In *assumpsit* to recover for advances made on cotton, which was destroyed by fire while stored in plaintiff's warehouse, the defence

EVIDENCE—CONTINUED.

was, that defendant was entitled to recoup for its loss; and there was evidence tending to show that plaintiff had contracted to store the cotton in a fire-proof warehouse: *Held*, that any evidence, however slight, which tended to show defendant's assent to the storing of his cotton in a house not fire-proof, was relevant and admissible for the plaintiff; and the fact that a certain aperture in the wall, through which the fire entered, was visible to the defendant, when he had once entered and examined the warehouse after his cotton had been stored, was relevant for this purpose. 201

20. A witness having been asked. whether, if plaintiff's warehouse had been as good as his own, it could have been saved by the use of ordinary diligence, answered, "Had it been as good as mine, eight such men could have saved it, but Major Dick was one": *Held*, that the latter clause of the answer was not responsive to the interrogatory. 201

21. When a general objection is made to an entire answer, a portion of which only is objectionable, it is not error to sustain the objection and exclude the whole answer. 201

22. Defendant may show in what manner a certain other warehouse "was built, that it was not burned, and the special efforts by which it was saved," if he first proves that it was fire-proof, and was exposed to the same damage as plaintiff's; but without this preliminary proof such evidence is inadmissible 201

23. The erroneous exclusion of redundant evidence, is not available on error, as no injury results from it. 201

24. An agreement, of record, that the testimony of a witness "shall be considered as regularly taken,,' does not prevent an objection to any portion of it containing illegal evidence.—Millard's Administrators v. Hall, 209

25. To authorize the admission of secondary evidence of the contents of an order of sale made by the court, its existence should be first proved, and its absence accounted for, or its loss established, after the requisite searches had been made for it in the proper office. 209

26. Upon questions of insanity, a witness whose acquaintance with the party has been such as to enable him to form a correct opinion of his mental condition, may not only depose to facts conducing to establish unsoundness of mind, but may also, in connection with those facts, give his own opinion upon the question of sanity or insanity.—Florey's Executor v. Florey, 241

27. The practice of admitting illegal evidence, and afterwards excluding it, is improper, because of the difficulty of eradicating from the minds of the jury the impression which the evidence may have made; but, where the record shows a clear and unequivocal charge, withdrawing and excluding such evidence from the consideration of the jury, its admission is, at most, error without injury. 241

28. A transcript from the records of a foreign court, whether of general or special and limited jurisdiction, is admssible evidence in the courts of this State, if properly authenticated; and our courts are bound to presume that the foreign court had jurisdiction of the

EVIDENCE—Continued.

subject-matter upon which it professes to adjudicate, until the contrary appears.—Slaughter v. Cunningham, 260

29. Where plaintiff claims as trustee for his grantor's children, under a deed made while said grantor was a minor, the defendant may show that the grantor disavowed the act after he became of age, and made another disposition of the property; and for this purpose, a deed of revocation and a bill of sale from the grantor to himself are admissible evidence. 260

30. A release from a stranger, or a transfer of all his interest in the property, is admissible evidence for the defendant in detinue, as tending to show title in himself. 260

31. Defendant claimed under a bill of sale from plaintiff's grantor, executed after he became of age, and said grantor derived his title from his grandfather's will, bequeathing the slave to him and his elder brother; plaintiff introduced evidence tending to show a division of the slaves between the two brothers while the younger was a minor, and that the elder was satisfied with it: *Held*, that defendant might introduce rebutting evidence, showing that the elder brother was dissatisfied with the division, and that defendant had paid him for his claim to the slave in suit. 260

32. In assumpsit for a breach of warranty of the soundness of a slave, plaintiff offered in evidence the deposition of the physician who attended the slave in her last sickness, whose testimony tended to prove that she had died of chronic pneumonia, having never recovered from an attack of acute pneumonia which she had had before the sale; in answer to the interrogatory, "State anything else you may know which will benefit the plaintiff," the witness answered, "As further testimony in favor of the plaintiff, I offer the two following cases, as having a bearing on the case at bar," and proceeded to detail the history of two cases, which he had treated, of acute pneumonia becoming chronic: *Held*, that the answer was not admissible evidence.—Bush & Co. v. Jackson, 273

33. Illegal evidence may be excluded, on motion, at any stage of the cause. 273

34. If a party fails to object to an interrogatory which asks for a conclusion of law, he cannot object to the answer, if it is responsive.—Townsend et al. v. Jeffries' Adm'r, 329

35. A practical surveyor, who testifies that he is familiar with the peculiar marks used by the United States' surveyors in their government surveys, may give his opinion, as an expert, whether a particular line was marked by them.—Brantly v. Swift, 390

36. Where a plaintiff claims under an absolute conveyance in fee from defendant, parol evidence of a contemporaneous verbal agreement for the retention of possession by the defendant until he had made another crop on the land, varies the legal effect of the deed, and is therefore inadmissible.—Melton v. Watkins, 433

37. The rule as to contradicting or varying a written instrument by parol proof, obtains with the same force in equity as at law. Therefore, where a written contract recited that the purchase money was to be paid on a specified day, and that the vendor was to make titles when

EVIDENCE—CONTINUED.

the purchase money was settled with him, and no fraud or mistake in its execution was alleged, it was held, that the terms of the contract could not be varied, in equity, by proof of a contemporaneous parol agreement that the purchase money was not to be paid on the day specified, but was to await a settlement of accounts between the parties.—Ware v. Cowles, 446

38. A written contract of sale, containing a warranty of soundness, is the highest and best evidence of that warranty, and as such admissible to prove it, in *assumpsit* for its breach, although the consideration averred in the declaration is a certain sum of money, while that expressed in the written contract is defendant's acceptance for that sum.—Brown v. Jones, 463

39. Evidence that the goods were charged on the merchant's books to the person to whom they were furnished, and that he afterwards settled the account, by paying a part in cash, and giving his note for the balance, is proper for the consideration of the jury, in determining whether the credit was given to him; but if the goods were sold on the faith of the written order, the rights and liabilities of the parties must be determined by it, and would not be affected by the fact that the merchant treated it as a collateral, instead of a direct undertaking, or that he charged the goods to the person who obtained them. Scott v. Myatt & Moore, 489

40. A map, not made under the authority of the State, or of the United States, although "generally received as a correct representation of what purports to be shown or described therein," is not admissible evidence.—Stein v. Ashby, 521

41. Evidence held sufficient (in this case) to establish the existence and *bona fides* of a certain debt secured by a deed of trust, where the validity of the deed was contested on the ground of fraud.—Ala. Life Ins. & Trust Co. v. Pettway, 544

42. Proof of a debt corresponding in every respect, except as to amount, with one of the secured debts may be received for the purpose of showing a mis-description of the debt, and thus repelling the inference of fraud, although it may not be sufficient to authorize a foreclosure as to the secured debt. 544

EXCEPTIONS, BILL OF.

1. When the bill of exceptions does not set out all the evidence, the Appellate Court will not presume that an affirmative charge was abstract, but, on the contrary, that it was fully warranted by the proof.—McElhany v. The State, 71

2. When the record shows an error in the conditional admission of evidence, it must also show that the error was rectified or cured by the introduction of the proper preliminary proof, or the judgment will be reversed: the Appellate Court will not presume that the error was corrected, or deprived of its injurious effects, because the bill of exceptions does not purport to set out all the evidence.—Moore v. Clay, 235

3. The stating of an administrator's accounts is the act of the court; and to enable the Supreme Court to determine whether there was error in

EXCEPTIONS, BILL OF—CONTINUED.

allowing any particular item, the bill of exceptions must set out all the evidence in relation to it which was before the primary court.—Bendall's Dist. v. Bendall's Adm'r, 295.

4. Where the plaintiff's evidence is all set out in his bill of exceptions, and shows that he is not entitled to recover, the judgment in favor of the defendant will not be reversed, on error or appeal, no matter what may have been the rulings of the court below.—Jones v. Graham, 450

5. When the bill of exceptions sets out all the evidence, an erroneous affirmative charge, which is shown to be abstract, furnishes no ground of reversal.—Salmons v. Roundtree, 458

6. When the minute entry recites that it was made to appear to the court that a judgment had been duly rendered, which the clerk had omitted to enter, it will be presumed, on error, that it was made to appear by sufficient legal evidence; if the evidence was insufficient, the defendant must show it by bill of exceptions.—Glass v. Glass, 468

EXECUTORS AND ADMINISTRATORS.

1. An administratrix who has possession of a slave belonging to her intestate's estate, is his mistress, within the purview of the statute against selling or delivering spirituous liquors to a slave without an order in writing signed by his "master or overseer."—Boltze v. The State, 89

2. An administrator of a solvent estate may, in this State, maintain ejectment for the lands of his intestate.—Golding v. Golding's Adm'r, 122

3. When an executor becomes surety on a note given for property purchased at a sale made by himself and his co-executor, and, the estate becoming insolvent, he is cited by his co-executor, on behalf of the creditors of the estate, to make final settlement and account for the note, he cannot protect himself by a plea of the statute of limitations of six years.—Shackelford v. King, 158

4. If an administrator in chief make a loan or gratuitous bailment of a slave belonging to the estate, both he and his bailee are guilty of a conversion; but the administrator himself cannot avoid the bailment, nor sue for the recovery of the property.—Lawson's Adm'r v. Lay's Executor, 184

5. If the loance of the administrator marry, and her husband come into possession of the slave, he is liable for damages in detinue, both for his own detention and that of his wife before marriage. 189

6. And if he die before suit brought, and the slave come to the possession of his executor as assets, the latter is liable for his own detention and that of his testator, and no demand is necessary. 184

7. An administrator is entitled to a credit for reasonable counsel fees paid for prosecuting and defending the interests of the estate.—Pinckard's Dist. v. Pinckard's Adm'rs, 250

8. Also, to reasonable counsel fees for services rendered on final settlement with the Probate Court, although exceptions were sustained to several items in his accounts and vouchers. 250

9. Expense of repairs to household furniture belonging to the estate is properly allowed, when the value of the furniture is thereby increased to that extent. 250

EXECUTORS AND ADMINISTRATORS—CONTINUED.

10. Counsel fees paid for prosecuting the widow's right to dower, and her account for medical services rendered after her husband's death, are personal charges against her, and not against the estate. 250
11. Counsel fees paid for guardian *ad litem* for the minor heirs, are a personal charge against them, and not against the estate. 250
12. Five per cent. on the amount of the estate held a reasonable allowance to the administrator, where he had managed the plantation for nearly a year, and raised a crop; the value of the estate being about $25,000. 250
13. Suit may be brought on an administration bond, at the option of the party injured by its breach, either in his own name, or in the name of the obligee for his use.—Amason et al. v. Nash, Judge &c., 279
14. To debt on bond against an administrator and his sureties, "jointly and severally defendants plead fully administered;" to which the plaintiff "demurred in short by consent:" *Held*, that the plea was equivalent to a joint and several plea of *plene administravit*, and was good as to the sureties. 279
15. In debt on an administration bond, it is error to render judgment final, against the principal and his sureties, without the intervention of a jury. 279
16. The allowance to an administrator of a credit for the cost of a tombstone erected over the deceased, must depend, in each case, upon the value of the estate and the desire of the deceased, as expressed by him orally or in his will. In a case where the estate amounted to about $8,000, and was bequeathed to collateral relations, the testator leaving neither widow nor children, the administrator was allowed a credit for $210, the cost of a marble tombstone, for which the testator had expressed a wish.—Bendall's Distributees v. Bendall's Administrator. 295
17. An administrator is not entitled on final settlement to a credit for counsel fees and cost paid by him in a chancery suit (which he had instituted against the legatees to restrain them from proceedings in the Court of Probate to compel a partial settlement of his administration), his bill having been dismissed for want of equity. 295
18. An administrator placed certain notes in the hands of his law partner for collection, who collected some of them by due course of law, filled up writs in other cases (but never issued them, or docketed the cases in court), and received the money from the debtors in all the other cases without suit. The court allowed him a credit for two and a half per cent. on the entire amount collected, for commissions paid to the attorney, and *it was held* no error of which the distributees could complain. 295
19. An administrator rightly allowed (*in this case*) a credit for $150, the amount of counsel fees paid by him to two attorneys for services rendered on his final settlement; the value of the estate being about $8,000, and the distributees contesting many of his accounts and vouchers, some of which were rejected. 295
20. Also, to five per cent. on the amount of his receipts as commissions, no wilful default or gross negligence being proved against him. 295
21. If an administrator wishes to discharge himself from the payment of

EXECUTORS AND ADMINISTRATORS—CONTINUED.

interest, he should make the affidavit required by the statute when his account is stated by the court on the day of settlement; if the distributees are taken by surprise, the court may continue the cause, to give them an opportunity to examine into the facts and contest the affidavit. 295

22. The stating of an administrator's accounts is the act of the court; and to enable the Supreme Court to determine whether there was error in allowing any particular item, the bill of exceptions must set out all the evidence in relation to it which was before the primary court. 295

23. When an executor brings trespass for injuries inflicted on a slave belonging to the estate of his testator, the suit may be revived, after his removal, in the name of the testator's administrator.—Townsend et al. v. Jeffries' Adm'r, 329

24. In debt on an administration bond, to charge the sureties with the amount of a decree of the Orphans' Court, the declaration alleged that a final settlement was had by the administrator with the Orphans' Court, "and on said final settlement the sum of $259 was, *by the decree and judgment of said court, assessed and decreed as the distributive share*" of the person for whose use the suit was brought, who was one of the distributees of the estate: *Held*, that the declaration was defective on demurrer, because it showed no judgment in favor of any one for the amount, and no order on the administrator to pay the money to any one.—Gilbreath v. Manning et al., 418

25. Where several co-executors qualify and give bond, a promise by the sole acting executor, who has the possession and control of the entire estate, will not remove the bar of the statute of limitations and revive the debt against the estate.—Pitts v. Wooten's Executors, 474

26. An action at law on their bond does not lie against the sureties of an executor, on a decree against his administrator, rendered by the Orphans' Court on the final settlement of his executorship, under the act of 1845.—Gray v. Jenkins, 516

27. Where an executor, by an arrangement with the creditors of the estate, obtained indulgence on the debts, which enabled him to purchase some of the property, at a sale under an order of the Chancery Court, which was had by consent, he was held to have purchased for the benefit of the estate, and not for himself individually; there being, also, some evidence of his declarations or admissions, at the time of the sale, that he was purchasing for the estate.—Montgomery v. Givhan et al., 568

28. If the executor, in accounting on settlement with one distributee or legatee, has accounted for less than he might have been charged with, this does not give another legatee any right to a greater interest in the residue. 568

29. An administrator is not chargeable with a bequest made to the intestate in his life-time, when the knowledge of it is not brought home to him.—Malinda and Sarah v. Gardner et al., 719

FRAUD AND FRAUDULENT CONVEYANCES.

1. A deed of trust held not to be fraudulent on its face, which was made without the knowledge of the preferred creditor, whose debt was

FRAUD AND FRAUDULENT CONVEYANCES—CONTINUED.

past due, and reserved to the grantor the use of the property until the creditor ordered a sale.—Lanier v. Driver, 149

2. The actual assent of a beneficiary is not required to a deed of trust which is clearly for his benefit. 149

3. Where a debtor executes two deeds of trust at different times, the beneficiaries in the second deed may enforce the execution of the trust after the law day of their deed, and therefore cannot complain of the negligence of the others after that time. 149

4. The retention of possession by the vendor of a chattel, if unexplained, is only *prima facie* evidence of fraud, as against creditors, and may be explained; and if the transaction is *bona fide* throughout, and such retention of possession is consistent with good faith and the absolute disposition of the property, the title passes by the contract of sale.—Millard's Adm'rs v. Hall, 209

5. When the facts in evidence show a sufficient explanation of the vendor's retention of possession, the party alleging fraud cannot complain on error that the court referred to the jury the question of their sufficiency. As to what is a sufficient explanation of the vendor's retention of possession. 209

6. A deed made to hinder, delay and defraud creditors, can only be declared void when attacked for the fraud; neither the grantor himself, nor his administrator, can set up the fraud against a subsequent purchaser from him, for the purpose of showing that a good title passed notwithstanding the deed, and thus preventing the purchaser from enjoining a judgment at law on the notes given for the purchase money.—Walton, adm'r, v. Bonham et al., 513

7. One of the debts secured by a deed of trust was described as a balance paid by the beneficiary on a certain note on which he was surety for the grantor, while the evidence showed that the debt was paid, in part, with notes of a third person borrowed by the grantor, in payment of which he gave his bond, with the beneficiary as his surety,—that the grantor was insolvent,—that the loan was made on the credit of the beneficiary, and that the latter had paid a portion of the note, and had given his individual security for the balance: *Held*, that it was competent for the parties, as between themselves, to change their relations to each other on the debt, and to treat it as the debt of the surety; and that their relation to each other with respect to the debt did not affect the question of fraud in the execution of the deed.—Ala. Life Ins. & Trust Co. v. Pettway, 544

8. Evidence held sufficient (in this case) to establish the existence and *bona fides* of a certain debt secured by a deed of trust, where the validity of the deed was contested on the ground of fraud. 544

9. Where a deed of trust is attacked for fraud, a general creditor of the grantor, whose debt is not secured by the deed, is a competent witness to prove the *boaa fides* of any secured debt, although he may have another security. 544

10. Proof of a debt corresponding in every respect, except as to amount, with one of the secured debts, may be received for the purpose of showing a mis-description of the debt, and thus repelling the infer-

FRAUD AND FRAUDULENT CONVEYANCES—CONTINUED.

ence of fraud, although it may not be sufficient to authorize a foreclosure as to the secured debt. 544

11. If a debtor, in failing circumstances, executes a deed of trust to secure some of his creditors, and, with the intent of saving a portion of the property to himself, fails to disclose the indebtedness of one of the secured creditors to him on another transaction, this would be a fraud upon his creditors, as against any one who, by assenting to the intent, participated in the fraud. 544

12. If a creditor, knowing the insolvency of his debtor, takes from him a deed of trust to secure the entire amount of his debt, without disclosing the fact that he is indebted to the grantor on another transaction not noticed in the deed, this would be a strong circumstance against him, and would probably be conclusive if the indemnity provided was fully adequate to the secured debt; but, if the mortgaged property was insufficient to pay the secured debts, by an amount exceeding the creditor's indebtedness to the grantor, or if there were other debts or liabilities not provided for by the deed, exceeding the creditor's said indebtedness, this would be sufficient to rebut every inference of fraud or dishonesty. 544

13. Courts will not strive to force conclusions of fraud; if the circumstances relied on to sustain the allegation of fraud, are fairly susceptible of an honest intent, that construction will be placed upon them. 544

See SURETIES, 11.

GENERAL ASSEMBLY.

1. The General Assembly, by a joint resolution of both Houses during its regular session, having adjourned on the 20th of December, 1853, to meet again on the 9th of January, 1854, a member who went home and returned during the recess, is entitled to mileage, but not to *per diem* compensation during the recess.—Ex parte Pickett, 91

2. The Supreme Court will take original jurisdiction of an application, by a member of the House of Representatives, for a *mandamus* against the Speaker of said House, to compel him to certify to the Comptroller of Public Accounts the amount to which the petitioner is entitled, as a member of said House, for mileage or *per diem* compensation. 91

GUARANTY.

See CONTRACTS, 6, 7, 8.

GUARDIAN AND WARD.

1. Under the statute authorizing the discharge of the sureties of a guardian (Clay's Digest 221 § 5, 222 § 7), the taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge; but the existence of this fact is to be determined by the judge to whom the application is made, and his decision is final and conclusive, and cannot be contradicted.—Hamner, adm'r, v. Mason et al, 480

GUARDIAN AND WARD—CONTINUED.

2. Therefore, where the sureties of a guardian of several minors applied for a discharge from all further liability on their bond, and a decree was thereupon rendered by the court, in which it was recited that the guardian had given a new bond, and ordered that the old sureties be discharged from all further liability: *Held*, in an action against the sureties on the old bond, that the recital in the decree was conclusive of the fact that a new bond had been given, although the name of the minor for whose use the suit was brought was entirely omitted from the new bond, which did not therefore protect his estate. 480

3. An execution cannot issue under the statute (Clay's Digest 305 § 45) against the sureties of a guardian, on a decree of the Orphans' Court, against the principal, embracing some items which accrued after their discharge. 480

4. Where letters of guardianship have been granted in this State, the guardian and ward both residing here at the time, the property cannot be removed to another State under the Code (§§ 2031, 2032), upon the application of another guardian appointed there, who alleges in his petition that the ward has been removed to that State.—Cook v. Wimberly et al., 486

5. Where the executor is also complainant's guardian, he should be allowed a credit, on the settlement of his accounts in equity, for reasonable expenses in boarding, clothing and educating her, although such expenses may exceed the interest or annual profits of her estate in his hands, if they were necessary under the circumstances; and if she, while residing with him, performed valuable services for him, she is entitled to set-off their value against his demand for board, &c.—Montgomery v. Givhan, 568

6. If the ward and her husband continue to board with her guardian, after their marriage, it will be presumed, in the absence of proof of any contract or agreement between the parties, that it was understood between them that the price of their board should be charged to the wife's property in the hands of her guardian; and the guardian will be allowed a credit for the amount, on the subsequent settlement of his accounts in equity, although the husband is insolvent. 568

7. The executor would also, in such case, be entitled to a credit for the value of slaves delivered to complainant and her husband when they commenced house-keeping, when complainant does not offer, in her bill, to return them, and her husband assents to her right to have them settled upon her for her separate support and maintenance. 568

HABEAS CORPUS.

1. Under the act establishing courts of probate, a judge of probate has power (now taken away by the Code) "to grant, hear and determine writs of *habeas corpus*" where the petitioner was confined in jail under a charge of grand larceny.—Hale et al. v. The State, 80

HUSBAND AND WIFE.

1. The husband is liable, in *assumpsit*, for necessaries furnished to the

HUSBAND AND WIFE—CONTINUED.

wife (she being separated from him without fault on her part) while confined in a lunatic asylum, although the credit for them was given to the person who, as agent for plaintiff, made the contract, and paid the expenses, which were afterwards repaid to him by his principal; but if the person who made the contract was acting for himself individually, and not as agent for the plaintiff, the latter cannot, by voluntarily paying the debt, make the husband his debtor.—Wray v. Cox, 337

2. When no provision is made for the wife by her husband's will, she may claim the provision which the law makes for her, without dissenting from the will as prescribed by the act of 1812 (Clay's Digest 172 § 3).—Turner et al. v. Cole, 364

3. Adultery on the part of the wife is no bar to her claim for a distributive share in her husband's estate under the act of 1812 (*Ib.* 173 § 4). 364

4. If the widow fails to present her claim for her distributive share of her deceased husband's estate to his personal representatives until after the estate has been finally settled by due course of law, her remedy against him and his sureties is gone, and she must follow the assets in the hands of the heir or distributee.—Turner et al. v. Cole, 364

5. The husband is liable for necessary medical attendance on his wife, although the physician was called in against his objection, by his grown son, who lived with him, and who promised him to assume the payment; it being shown that the husband was present while the physician was rendering his services, and that the latter had no notice whatever that he was not to look to the husband for payment.—Cothran v. Lee, 380

6. The act of 1848, "securing to married women their separate estates," has no retro-active effect to defeat the marital rights which had vested in the husband prior to its passage; and where he had reduced to his possession as husband, before the passage of that act, his wife's interest in certain slaves, their subsequent sale by order of the Chancery Court, for the purpose of distribution, would not have the effect of divesting his rights and turning the money into a chose in action.—Manning v. Manning, 386

7. Husband and wife being entitled to certain funds in the Chancery Court (the separate property of the wife, which the husband was entitled to hold as her trustee without accounting), the wife filed her petition in said court, alleging her husband's incapacity and unfitness to act as her trustee, and praying that another trustee might be appointed to take charge of the fund; the evidence showed that she had abandoned him without sufficient cause, and removed beyond the jurisdiction of the court with another man, while it failed to establish the husband's alleged incapacity and unfitness: the petition was dismissed, at the costs of the next friend of the petitioner. 386

8. The wife's right to a settlement of her property to her separate support and maintenance, is unaffected, as between the executor and herself, by any transaction between him and her husband, which had no reference to her estate in the executor's hands, and were not designed to be credited to that fund.—Montgomery v. Givhan et al., 568

HUSBAND AND WIFE—CONTINUED.

9. If the wife's property in the executor's hands, in such case, is more than sufficient for the reasonable support and maintenance of herself and children, and her husband is indebted to the executor on the settlement of their accounts, the executor should be allowed to retain the balance due him from the husband after making a reasonable settlement on the wife. 568
10. When slaves are sent by a father to his daughter's home on her marriage, the presumption of law is, that they are intended as an advancement to the husband, and they became his property prior to the passage of the laws securing to married women their separate estates. This presumption can only be rebutted by proof of a different intention, clearly and distinctly avowed at or before the time of delivery; his subsequent declarations, unless made in the presence of the donee and sanctioned by him, are not admissible for any purpose, in a contest between the donor and donee, or those claiming under them.—Rumbly v. Stainton and Wife, 712
11. If the husband, in such case, after the delivery of the slaves, accepts a deed from the donor, conveying them to his wife and the heirs of her body, his marital rights are not thereby affected. 712
12. Evidence held insufficient to authorize the reformation of a deed of gift to a married woman, on an allegation of the donor's intention to exclude the marital rights of her husband. 712

INFANTS.

1. An infant is *in esse*, for the purpose of taking an estate for its benefit, from the time of conception, provided it be born alive and after such a period of fœtal existence that its continuance in life may be reasonably expected.—Nelson v. Iverson, 9
2. Where non-resident infants are necessary parties to a bill, the record must show that publication as to them was made in the manner prescribed in the third and forty-first rules of our Chancery Practice.—Coster's Executors v. Bank of Georgia et al., 37
3. Where plaintiff claims as trustee for his grantor's children, under a deed made while said grantor was a minor, the defendant may show that the grantor disavowed the act after he became of age, and made another disposition of the property; and for this purpose, a deed of revocation and a bill of sale from the grantor to himself are admissible evidence.—Slaughter v. Cunningham, 260
4. Where slaves are bequeathed to two brothers jointly, and after the elder becomes of age a division of them is made by him and his father, the latter acting for his infant son, the division is binding upon the minor until he dissents from it; and if he ratifies it, the elder brother cannot avoid it. 260
5. A deed of gift, executed by a minor in trust for his children, is not void, but voidable merely; and in a contest between the trustee and a subsequent purchaser from the grantor, the question of the disavowal of the gift should be left to the decision of the jury. 260
6. And if the minor acknowledge the deed in open court, this does not render it irrevocable, nor require that the revocation should be made

INFANTS—Continued.

in open court after notice to the parties; when the grantor retains possession, any act on his part after attaining his majority which shows to the world that he does not intend to be bound by his deed, is sufficient to revoke it. 260

7. A bond for title, given by an infant, is not absolutely void, but voidable only.—Weaver v. Jones, 420

8. If an infant disaffirms his contract of sale on arriving at full age, and sue his vendee for use and occupation, the latter may recoup for valuable improvements erected on the land. 420

9. An infant cannot appoint an agent, nor make any binding contract in relation to the compromise of slanderous words spoken of him, if, on coming of full age, he think proper to disavow and annul it.—Ware v. Cartledge, 622

INSOLVENT ESTATES.

1. In the matter of the settlement of an insolvent estate, an issue having been formed between the executor and creditors, various irregular pleadings were afterwards allowed by the court, and the executor then sued out a writ of error to reverse the judgment rendered against him: *Held*, that the case should be considered as if the parties had been held to the issue which they had first formed, and that the subsequent pleadings and rulings of the court should be disregarded.—Shackelford v. King, 158

2. Prior to the passage of the act of 1843, two joint executors filed "a statement of the condition of the estate" of their testator, showing an excess of debts over personal assets, which was received by the court, and ordered to be recorded, the order reciting that the estate appeared to be insolvent; and the real estate was afterwards sold, as in cases of insolvent estates: *Held*, that this was sufficient to give the court jurisdiction of the estate as insolvent, and that it should be so settled. 153

3. Since the passage of the act of February 11, 1850, if the settlement of an insolvent estate is transferred from the Probate to the Circuit Court, on account of the incompetency of the probate judge to preside in the case, the latter court should not appoint commissioners to settle the estate, but should proceed with the case as the former would have done. 158

4. When an executor becomes surety on a note given for property purchased at a sale made by himself and his co-executor, and, the estate becoming insolvent, he is cited by his co-executor, on behalf of the creditors of the estate, to make final settlement and account for the note, he cannot protect himself by a plea of the statute of limitations of six years. 158

5. As to his raising the objection that no sufficient notice of the settlement had been given. 158

6. On the trial of an issue between the executor and the creditors of an insolvent estate, a note may be given in evidence without any proof of its execution, if its execution is not denied by the plea of *non est factum*. 158

7. An endorser who pays a note may present his claim, at any time with-

INSOLVENT ESTATES—CONTINUED.

in six months after the payment, against the estate of a prior endorser, which was declared insolvent more than six months previously, although the holder failed to present the note as a claim against the estate.—Henry v. Black's Adm'rs, 417

8. Partnership creditors are not entitled to share *pari passu* with the separate creditors in the estate of a deceased partner, when it is insufficient to pay its separate debts, and the surviving co-partner, though insolvent, has a joint fund in his hands.—R. W. Smith & Co. v. Mallory's Ex'r, 628

9. The object of the act of 1839 was not to affect in any way the rights which a separate creditor had against the estate of the deceased partner, but simply to allow the partnership creditor to assert his claim against such estate in a court of law, instead of resorting to a court of equity. 628

10. The act of 1843 was intended to make all the debts equal in degree—to place simple contract debts on the same footing with debts by judgment and specialty; but it was not intended to fasten upon the estate, to the prejudice of separate creditors who had a superior equitable and legal right, claims which, without reference to the statute, could not have been asserted against the estate, either at law or in equity. 628

JUDGMENTS AND DECREES.

1. After the rendition of a judgment in ejectment for the plaintiff, the parties entered into a written agreement fixing a different boundary line from that ascertained by the judgment; at the bottom of this agreement was written, in the handwriting of the presiding judge, this memorandum: "The judgment heretofore rendered in this case is set aside, and the foregoing agreement;" and the agreement was entered on the minutes of the court at the same term: *Held*, that this was not sufficient evidence to authorize the rendition of a judgment *nunc pro tunc* at a subsequent term, and that the previous judgment was valid and subsisting.—Chighizola's Heirs v. Doe, ex dem. Eslava, 237

2. In debt on an administration bond, to charge the sureties with the amount of a decree of the Orphans' Court, the declaration alleged that a final settlement was had by the administrator with the Orphans' Court, "and on said final settlement the sum of $259 was, *by the decree and judgment of said court, assessed and decreed as the distributive share*" of the person for whose use the suit was brought, who was one of the distributees of the estate: *Held*, that the declaration was defective on demurrer, because it showed no judgment in favor of any one for the amount, and no order on the administrator to pay the money to any one.—Gilbreath v. Manning et al., 418

3. A judgment may be rendered *nunc pro tunc*, on motion, without notice to the defendant.—Glass v. Glass, 468

4. Under the act establishing Courts of Probate, the Circuit Court has power to make amendments *nunc pro tunc* of the judgments of the County Court, in causes transferred to the former court under that act. 468

JUDGMENTS AND DECREES—CONTINUED.

5. A judgment may be rendered *nunc pro tunc* and revived by *scire facias* at the same term; and there is no impropriety in uniting a notice of the motion to amend in the *sci. fa.* to revive. 468

6. A writ of error does not lie from a decree of the Court of Probate, purporting to have been rendered on the final settlement of an estate, and reciting that the administrator "moved the court to be discharged on the grounds of payment and delivery of the property in his hands to the heirs; which motion being argued by counsel on both sides, and due deliberation had thereon by the court, it is considered by the court that the testimony is not sufficient to discharge the administrator."—Hamilton, adm'r, v. Gwynn and Wife, 515

7. The written opinion of the presiding judge, when the circuit judges were required to file their opinions in writing, was sufficient to authorize the rendition of a judgment *nunc pro tunc* at any subsequent stage of the proceedings; and if it recited the fact of the defendant's appearance, it would be sufficient to sustain the judgment without service of process.—The State, ex rel. Waring, v. The Mayor, &c., of Mobile, 701

8. On a bill filed to enforce the execution of a decree, if the record shows sufficient to authorize an amendment of the decree *nunc pro tunc*, by reciting the fact that the defendant therein appeared although not served with process, the court will consider the amendment as made, and will sustain the former decree. 701

JUDICIAL SALES.

1. Where slaves are attached, and sold under an order of court as "perishable property like to waste or be destroyed by keeping," the sale is sufficient to pass the title to the purchaser (LIGON, J., *dissenting*).—Millard's Adm'rs v. Hall, 210

2. An order of court directing the sheriff to "proceed to sell" certain property in his hands, which he had attached, and "pay the proceeds into court," is a sufficient authority to him to make the sale, without any process or copy of the order from the clerk. 210

3. To authorize the admission of secondary evidence of the contents of an order of sale made by the court, its existence should be first proved, and its absence accounted for, or its loss established, after the requisite searches had been made for it in the proper office. 210

4. The plaintiff in the execution, under which a sale is made by a constable, is not a necessary party to a motion to set aside the sale on the ground that the constable had no authority to make it.—Stainton's Adm'rs v. Simmons, 410

JURISDICTION.

1. Under the statute authorizing the discharge of the sureties of a guardian (Clay's Digest 221 § 5, 222 § 7), the taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge; but the existence of this fact is to be determined by the judge to whom the application is made, and his decision is final and conclusive, and cannot be contradicted.—Hamner, adm'r, v. Mason et al., 480

JURISDICTION—CONTINUED.

2. The City Court of Mobile has jurisdiction of an action on the case to recover damages for the diversion of the water of a running stream to the injury of plaintiff's mill privileges.—Stein v. Ashby, 521

JUSTICES OF THE PEACE.

1. A justice of the peace has authority, in cases of emergency, to appoint a special constable (Code § 712); and he must himself judge of such emergency.—Noles v. The State, 672

LIMITATIONS, STATUTE OF.

1. When an executor becomes surety on a note given for property purchased at a sale made by himself and his co-executor, and, the estate becoming insolvent, he is cited by his co-executor, on behalf of the creditors of the estate, to make final settlement and account for the note, he cannot protect himself by a plea of the statute of limitations of six years.—Shackelford v. King, 158
2. The statute of limitations begins to run in favor of the loanee or gratuitous bailee of the administrator in chief, from the time of the appointment of an administrator *de bonis non*.—Lawson's Adm'r v. Lay's Executor, 184
3. Where several co-executors qualify and give bond, a promise by the sole acting executor, who has the possession and control of the entire estate, will not remove the bar of the statute of limitations and revive the debt against the estate.—Pitts v. Wooten's Ex'rs, 474
4. When a party propounds his interest by petition to the court, praying to be made a party to a suit that he may prosecute an appeal or writ of error from the final decree, the order making him a party would relate back to the time when the decree was rendered; and therefore, if his petition shows than an appeal or writ of error from the decree is already barred by the statute of limitations, it will not be granted. This rule applies equally to Chancery Courts and Courts of Probate.—Boykin v. Kernochan, 697
5. The limitation prescribed to writs of error by the act of 1818 (Clay's Digest 309 § 17), applies to final decrees in chancery, as well as to final judgments at law. 697

MANDAMUS.

1. The Supreme Court will take original jurisdiction of an application, by a member of the House of Representatives, for a *mandamus* against the Speaker of said House, to compel him to certify to the Comptroller of Public Accounts the amount to which the petitioner is entitled, as a member of said House, for mileage or *per diem* compensation.—Ex parte Pickett, 91
2. The Supreme Court will not interfere, by *mandamus*, or otherwise, to compel the dissolution of an injunction on the filing of an answer. Ex parte City Council of Montgomery, 93
3. The validity of a will of realty and personalty was contested on three grounds, viz., because it was not signed by the subscribing witnesses in the presence of the testator; because the testator, at the time of its execution, was of unsound mind and memory; and

MANDAMUS—CONTINUED.

because it was procured by fraud and undue influence on the part of the testator's wife; the jury having returned a verdict finding it invalid generally, the court, on motion of the contestant, inquired on what their verdict was predicated, to which one of their number replied, "principally on the ground that it was not signed by the witnesses in the presence of the testator;" and the court then ordered them to retire and find another verdict: *Held*, that the contestant could not have a *mandamus* for judgment on this first verdict. 638

4. Where a verdict, finding the will invalid, is rejected by the court on the motion of the contestant himself, he cannot afterwards have a *mandamus* for judgment on it. 638

MARRIED WOMEN, SEPARATE ESTATE OF.

See HUSBAND AND WIFE.

MOBILE WATER WORKS.

1. A legislative grant to an incorporated company, conferring upon them "the exclusive right and privilege of conducting and bringing water for the term of forty years," gives them no right to divert the water of a running stream, to the injury of the riparian proprietors, without making compensation.—Stein v. Burden, 130
2. An act authorizing the lessee of certain city water works to sue out a writ of *ad quod damnum*, to ascertain the damage sustained by riparian proprietors from his diversion of the water of a running stream, does not deprive a riparian proprietor of his common law action for damages, on the lessee's failure to sue out the writ. 130
3. A municipal corporation, owning lands on a water-course from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of the other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants. 130
4. Actual possession under claim of title is sufficient to sustain an action on the case for diverting water from a mill; and therefore evidence showing that plaintiff had no title to the land on which the mill was situated, is inadmissible. 130
5. A riparian proprietor is entitled to nominal damages for a diversion of the water from his mill, without any proof of actual damage. 130
6. The uniform and uninterrupted diversion of water from a running stream for a period of twenty years, gives a title by prescription: it is not necessary that the water should be used in precisely the same manner, or applied in the same way; but no change is allowed which would be injurious to those whose interests are involved. 130
7. The lessee of a two storied house in Mobile, having sub-let the second story to a club, with which he had no connection whatever, was held not liable, under the by-laws regulating the City Water Works, for the water rates assessed against the occupants of the second story.—Stein v. McArdle & Waters, 344
8. The contract between the corporate authorities of Mobile and Albert Stein, by which the latter became the lessee and proprietor of the City Water Works for the term of twenty years, does not exempt his

MOBIEE WATER WORKS—Continued.

interest in said water works from taxation by the city, inasmuch as the contract contains no stipulation for such exemption. (Re-affirming Stein v. The Mayor &c. of Mobile, 17 Ala. 234).—Stein v. The Mayor &c. of Mobile, 591

9. The City Water Works of Mobile are taxable as real estate by the corporate authorities of the city; and a lessee who holds under a contract with the corporation, by which he acquires all their corporate rights and privileges in the water works for the term of twenty years, and in perpetuity if not then redeemed by the city, is liable for the tax assessed against said water works. 591

MORTGAGES.

1. Where money is loaned to a partnership on the faith of the partnership property, equity will consider the creditor, as between himself and the several partners, as a mortgagee, with a lien upon the property until his debt is paid.—Coster's Executors v. Bank of Georgia, et al., 37

2. An unrecorded mortgage is void, under the acts of 1823 and 1828, as to a subsequent mortgagee without notice, although his deed is also unrecorded. 37

3. A mortgage given to one surety, for his indemnity against a particular debt, enures to the benefit of his co-surety; and the mortgagee cannot apply the funds to any other debt than that specified in the mortgage, to the prejudice of his co-surety.—Steele v. Mealing, 285

4. If the mortgage, in such case, contains a power of sale upon default being made in the payment of the debt, and the mortgagee, after the law day of the deed, permits the property to be levied on and sold by the sheriff, under execution against the mortgagor, he is chargeable, at the suit of his co-surety, with its value; but the latter must allege such neglect in his bill, or he cannot charge the mortgagee with it. 285

5. The mortgagor's cotton having been levied on, the mortgagee became surety on the replevy bond, and the cotton was delivered to the mortgagor, who shipped it Mobile, where it was sold by the consignees, and the proceeds were applied by them to the part payment of a debt due to them by the mortgagor, on which the mortgagee was surety, and which was one of the debts secured by the mortgage: *Held*, that the mortgagee was not entitled to a credit for what he was compelled to pay on the replevy bond, as against his co-surety on the other mortgage debts. 285

6. When the mortgagee repudiates his trust, and compels his co-surety to file a bill against him to establish it and make him account, he is not entitled, on the taking of the account, to commissions for selling the property. 285

7. An absolute bill of sale of a slave decreed to stand only as a mortgage, upon proof that the vendor was upwards of seventy years old,—infirm,—embarrassed,—his property levied on, and about to be sold,—and that the vendee, who was his son-in-law, took advantage of all these circumstances to make the transaction assume the form of an absolute sale instead of a mortgage.—Smith et al. v. Pearson, 355

NE EXEAT.

1. A writ of *ne exeat* was granted in a chancery cause, upon complainants' entering into bond conditioned that they should "prosecute their said bill and writ to effect," or, failing therein, should pay to the defendant all such costs and damages as he might "sustain from the wrongful filing of said bill, or the wrongful suing out of said writ of *ne exeat*." The defendant having brought suit on the bond, *it was held*, that, although the condition of the bond was not complied with by merely prosecuting the bill to effect, yet an order discharging the defendant from custody under the writ, upon his delivering up to complainant certain slaves in his possession, was not such a failure to prosecute said writ to effect, as would entitle the defendant to maintain an action on the bond for damages.—Spivey v. McGehee et al., 476

NUISANCE.

1. Where a decree has been rendered against the corporate authorities of a city for the abatement of a public nuisance, on an information in the name of the State at the relation of certain citizens, any citizen may interfere as relator, by a proceeding in the nature of a bill of revivor, and call on the court to carry the decree into execution.—The State, ex rel. Waring, v. Mayor, &c., of Mobile, 701

PARTITION FENCES.

1. By the common law, a tenant of a close is not bound to fence against an adjoining close, unless by force of prescription; and where no prescription or agreement exists, the legal obligation of tenants of adjoining lands to make and maintain partition fences, depends entirely upon statutory provisions.—Moore v. Levert, 310
2. Our statute on the subject of partition fences (Clay's Digest 241 § 4), does not restrict a tenant's right to let his own lands lie open; he being responsible in damages for his cattle breaking into any grounds which are enclosed with a lawful fence. 310
3. The fact that some pannels of the defendant's outside fence were down, though not conclusive evidence that his lot was unenclosed, is nevertheless evidence whose weight should be left to the consideration of the jury in ascertaining that fact. 310
4. If defendant's lot is in possession of a trespasser, or of one claiming title in himself or a third person, defendant is not liable for the erection or repairs of a partition fence; but if he consent, as owner, to the erection of the fence, and it is made by the adjoining proprietor upon the the consent thus given, he is estopped from denying his liability. 310
5. In an action to recover one-half of the expenses of a partition fence, the actual interest which the parties have in the fence is a question which cannot arise. 310

PARTNERSHIP.

1. The entire assets of a partnership are, in equity, subject to the payment of its debts.—Coster's Executors v. Bank of Georgia et al., 87
2. Where money is loaned to a partnership on the faith of the partner-

PARTNERSHIP—CONTINUED.

ship property, equity will consider the creditor, as between himself and the several partners, as a mortgagee, with a lien upon the property until his debt is paid. 87

3. When the legal title to real estate belonging to a partnership is vested in one of its members, the lien acquired by a judgment against him individually, in favor of a creditor of the company, is subject to the equities already existing over the property; and a judgment against the company itself would not operate as an efficient lien on the land. 87

4. Partnership creditors are not entitled to share *pari passu* with the separate creditors in the estate of a deceased partner, when it is insufficient to pay its separate debts, and the surviving co-partner, though insolvent, has a joint fund in his hands.—R. W. Smith & Co. v. Mallory's Ex'r, 628

5. The object of the act of 1839 was not to affect in any way the rights which a separate creditor had against the estate of the deceased partner, but simply to allow the partnership creditor to assert his claim against such estate in a court of law, instead of resorting to a court of equity. 628

6. The act of 1843 was intended to make all the debts equal in degree—to place simple contract debts on the same footing with debts by judgment and specialty; but it was not intended to fasten upon the estate, to the prejudice of separate creditors who had a superior equitable and legal right, claims which, without reference to the statute, could not have been asserted against the estate, either at law or in equity. 628

PHYSICIAN OF THE PENITENTIARY.

1. The second section of the act of 1848, "to provide for the appointment of inspectors and physician for the penitentiary," confers upon the lessee and inspectors jointly the power of appointing the physician; if the lessee fails to appoint within three days after the happening of a vacancy, the inspectors alone may fill the place: but if the lessee makes a nomination within such three days, which is rejected by the inspectors, he has a reasonable time (not exceeding three days) after the rejection, within which to make another nomination; an appointment by the inspectors alone, before the expiration of three days after such rejection, is void, and confers no authority on their appointee.—Jones v. Graham, 450

PLEADING AND PRACTICE AT LAW.

1. The question whether the State can commence a suit by attachment, cannot be raised by a demurrer to the declaration.—Van Dyke v. The State, 81

2. On the trial of an issue between the executor and creditors of an insolvent estate, a note may be given in evidence without any proof of its execution, if its execution is not denied by the plea of *non est factum*.—Shackelford v. King, 158

3. Although the several counts in a declaration should be considered, on demurrer, as separate and distinct, yet, where one expressly

PLEADING AND PRACTICE AT LAW—CONTINUED.

refers to another, the latter, although abandoned, may be looked to in aid of the former.—Robinson v. Drummond, 174

4. Suit may be brought on an administration bond, at the option of the party injured by its breach, either in his own name, or in the name of the obligee for his use.—Amason et al. v. Nash, Judge, &c., 279

5. To debt on bond against an administrator and his sureties, "jointly and severally defendants plead fully administered;" to which the plaintiff "demurred in short" by consent:" *Held*, that the plea was equivalent to a joint and several plea of *plene administravit*, and was good as to the sureties. 279

6. In debt on an administration bond, it is error to render judgment final, against the principal and his sureties, without the intervention of a jury. 279

7. When defendant is in court, and consents to the revival of a suit in the name of an administrator as plaintiff, and at a subsequent term continues the cause, he will be held to have waived all objections to the order of revival.—Townsend v. Jeffries' Adm'r, 329

8. When an executor brings trespass for injuries inflicted on a slave belonging to the estate of his testator, the suit may be revived, after his removal, in the name of the testator's administrator. 329

9. In a plea in abatement, form is substance; and therefore, in trespass, a plea in abatement defending "the *wrong* and injury," instead of "the force and injury," is bad on demurrer. 329

10. If a party fails to object to an interrogatory which asks for a conclusion of law, he cannot object to the answer, if it is responsive, 329

11. In trespass for whipping a slave, a plea averring that defendant only punished said slave reasonably and moderately, is defective on demurrer. No person has a right to chastise a slave belonging to another, without the owner's consent, unless the authority is given to him by statute; and if he acted under such authority, he must aver it in his plea. 329

12. Where the demand in suit is under $20, both parties being competent witnesses for every purpose, it is discretionary with the court to permit plaintiff to be re-examined for the purpose of rebutting the testimony of one of defendant's witnesses.—Stein v. McArdle & Waters, 344

13. A general demurrer to a declaration containing one good count may be overruled.—Ferguson and Scott v. Baber's Adm'rs, 402

14. When the defendant's attorney withdraws his appearance at the judgment term, "and defendant makes no further defence;" *nil dicit* is the proper judgment.—Summerlin v. Dowdle, 428

15. After judgment by *nil dicit*, the defendant cannot take advantage on error of a variance between the writ and declaration. 428

16. The character in which a party sues must be determined from the body of the declaration, and not from his description of himself in its caption. If, therefore, he describes himself as administrator in right of his wife, and declares on a right of action accruing to him individually, he must be regarded as suing in his individual capacity, and the superadded words must be held a mere *descriptio personæ*; and upon his death, in such case, the suit should be re-

PLEADING AND PRACTICE AT LAW—CONTINUED.

vived in the name of his personal representative.—Tate v. Shackelford's Adm'r, 510

17. The sustaining of a demurrer to a special plea, when the facts stated in it may be given in evidence under the general issue, is not an error for which the judgment will be reversed.—Stein v. Ashby, 521

18. When an admission of record is made by counsel in the court below, for the purpose of obviating the necessity of proof, it will be presumed that he had authority to make it, and the admission cannot be withdrawn in the appellate court.—Montgomery v. Givhan et al., 568

PRESCRIPTION.

1. The uniform and uninterrupted diversion of water from a running stream for a period of twenty years, gives a title by prescription: it is not necessary that the water should be used in precisely the same manner, or applied in the same way; but no change is allowed which would be injurious to those whose interests are involved.—Stein v. Burden, 130

2. The use of the water of a running stream for nine years confers no right.—Stein v. Ashby. 521

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETIES.

PROBATE, COURT OF.

1. Under the act establishing courts of probate, a judge of probate has power (now taken away by the Code) "to grant, hear and determine writs of *habeas corpus*" where the petitioner was confined in jail under a charge of grand larceny.—Hale et al. v. The State, 80

2. A testator appointed his widow guardian of his minor children and executrix of his will, and directed the share of each child to be paid on its arriving at full age; a division of the estate was afterwards had between the widow and children, by persons duly appointed by the Orphans' Court, but no settlement was made with the court; after the widow's death, her administrators were cited, by one of the testator's legatees, to settle her executorship, and also, by one of her distributees, to settle their administration on her estate; after due notice, all the parties in interest appeared, and "it was agreed that both estates should be blended and considered as one, as the parties in interest to both were precisely the same;" and a settlement was made, and a decree rendered accordingly: *Held*, on error assigned by the administrators, that the decree was erroneous, because the two estates could not be thus consolidated by the Probate Court.—Richardson's Adm'rs v. Richardson et al., 395

See EXECUTORS AND ADMINISTRATORS.

ESTATES OF DECEASED PERSONS.

WILLS.

PROMISSORY NOTES.

1. The assignee or endorsee of a note given for the purchase money of land, cannot stand in a higher or better position than the original payee or vendor occupied.—Coster's Ex'rs v. Bank of Ga. et al., 37
2. When lands are purchased by a partnership from one of its members, who pledges his entire interest in the company to indemnify it against any loss which it might sustain in the purchase, and guaranties that the land can be re-sold within five years for at least the amount of the purchase money, and the lands remain unsold after the expiration of the five years, an assignee of the notes given for the purchase money cannot assert a vendor's lien, as against a member of the company who had guarantied their payment, and had paid a part of them. 37
3. Nor can an assignee of the notes assert a vendor's lien as against a remote assignee of the vendor's interest in the company, who purchased *bona fide*, for valuable consideration, without notice of any such outstanding claim or equity. 37
4. On the trial of an issue between the executor and the creditors of an insolvent estate, a note may be given in evidence without any proof of its execution, if its execution is not denied by the plea of *non est factum*.—Shackelford v. King, 158
5. An endorsement of a note by one of the makers, purporting to transfer it, by written power of attorney, in the name of the payee, must be held to be the act of the payee himself.—Garrett et al. v. Holloway & Malone, 376
6. When a person who is about to purchase a note given for the hire of a slave, applies to the maker for information concerning it, and is assured by the latter that he has no defence against it, this does not preclude the maker, when sued by the purchaser, from setting up a subsequent failure of consideration, arising out of the payee's conduct in receiving the slave, who ran away before the expiration of the term of hiring, and refusing to deliver him up on demand.—Maury v. Coleman, 381
7. The acceptance of a note may be an extinguishment and payment of a judgment, whether proceeding from a defendant or a stranger.—Brewer v. Br. Bank at Montgomery, 439
8. When a note is payable on a specified day, and contains a stipulation that it shall not bear interest until another specified day after maturity, an action may be maintained on its non-payment at maturity, although the judgment will bear interest from the time of its rendition; but the judgment must be for the principal only, without interest.—Billingsley's Adm'r v. Billingsley, 518
9. And the fact that the note is secured by a mortgage containing a power of sale, in which the law day is fixed at the time when interest begins to accrue, does not affect the mortgagee's right to proceed to judgment on the note, if it is not paid at maturity. 518

PUBLIC LAND LAWS.

1. The acts of Congress of 1805 and 1820, "concerning the mode of surveying the public lands of the United States," do not establish the corners of sub-divisions of fractional sections, as fixed by the United States' surveyors, as the true corners; but the corners of quarter

PUBLIC LAND LAWS—Continued.

sections are to be placed equi-distant from the section corners on the same line. (Adhering to the decision in Walters v. Commons, 2 Porter 38.)—Nolen v. Palmer, 391

2. When the course of a running stream through a fractional section prevents the sub-division of the quarter sections into eighty acre tracts, under the act of Congress of April 24, 1820, the sub-division of a quarter section by the United States' surveyor into two tracts divided by the stream, is not in contravention of the act.—Stein v. Ashby. 521

3. Certain boundaries are of more importance than quantity in designating lands. Therefore, where a patent calls for a sub-division of a fractional quarter section, described as lying north of a certain creek and containing a specified number of acres, it embraces all the land in the sub-division north of the creek, although the actual number of acres exceeds the number specified in the patent. 521

SCIRE FACIAS.

1. Whether the statute requiring the revival of a judgment by a *scire facias*, when no execution was issued within a year and a day after its rendition (Clay's Digest 206 § 28), applies to a decree in chancery for the abatement of a public nuisance, on information filed in the name of the State at the relation of certain citizens, *quere?* But if it does apply, its only effect is, to compel the party seeking to enforce the decree to proceed by bill of revivor or *scire facias*.—State, ex rel. Waring, v. Mayor, &c., of Mobile. 701

SHERIFFS AND CONSTABLES.

1. An order of court directing the sheriff to "proceed to sell" certain property in his hands, which he had attached, and "pay the proceeds into court," is a sufficient authority to him to make the sale, without any process or copy of the order from the clerk.—Millard's Adm'r v. Hall, 210

2. A justice of the peace has authority, in cases of emergency, to appoint a special constable (Code § 712); and he must himself judge of such emergency.—Noles v. The State, 672

3. A warrant, issued by a justice of the peace, if it shows on its face that the justice had no authority to issue it, is no protection to the officer executing it, but he may be treated as a trespasser. 672

4. An affidavit, by a married woman, that "she *is afraid* her husband will beat, wound, maim or kill her, or do her some bodily hurt," is not sufficient to authorize the arrest of the husband (Code § § 3340, 3341); and if the warrant of the justice appears on its face to be predicated on such an affidavit, it is void, and furnishes no protection to the officer executing it. 672

SLANDER.

1. In an action of slander for words spoken charging plaintiff with the crime of arson, the words laid were: "I next morning saw a track going to, and returning from the house. The toes turned in; and I know of but one man who owes me enmity enough to do such a thing, and you know whom I mean, B. D." (plaintiff): *Held*, that the words

SLANDER—Continued.

were not, of themselves, actionable; and, as there was no averment of any matter of fact tending to identify the plaintiff as the person who made the tracks, the count was demurrable.—Robinson v. Drummond, 174

2. When justification and the general issue are pleaded to an action of slander, if defendant fails to establish the former plea, it may be considered by the jury in aggravation of damages. 174

3. In an action of slander, the defendant may show, in mitigation of damages, that he was incited and provoked to the utterance of the slanderous words, by some act or declaration of the plaintiff, contemporaneous with the speaking of the slander, or nearly concurrent therewith; but to render such act or declaration of the plaintiff admissible in evidence, it must be shown to have been the immediate and proximate cause or provocation of the slanderous words: it is not sufficient, to show that it occurred, and was communicated to the defendant, before the speaking of the slanderous words.—Moore v. Clay, 235

4. In slander for words spoken which are actionable in themselves, it is not necessary to aver in the declaration the name of the person to whom, or in whose presence, they were spoken.—Ware v. Cartledge, 622

5. Evidence of the defendant's wealth is not admissible for the plaintiff in an action of slander. 622

6. Where the words spoken impute to plaintiff (an unmarried female) a want of chastity, evidence of other acts and words on the part of defendant, committed and spoken subsequent to the speaking of the words charged, but before the commencement of the suit, implying a want of chastity on the part of plaintiff, and indicating a desire to harrass, insult and degrade her, but not forming of themselves a separate cause of action, are admissible for plaintiff to show malice. 622

7. An infant cannot appoint an agent, nor make any binding contract in relation to the compromise of slanderous words spoken of him, if, on coming of full age, he think proper to disavow and annul it. 622

8. In slander for words spoken, the words charged, which were alleged to have been spoken of and concerning plaintiff, and of and concerning his trade and occupation as clerk for the firm of defendant and his partner, were as follows: "Your man (plaintiff) is plotting to blow me (defendant) and the concern (the firm) up, and I believe you have a hand in it:" *Held*, that the words were actionable, *per se*, when connected by the *colloquium* and innuendo with the plaintiff's occupation as clerk, without an averment of special damage: and that they were spoken in the present time, makes no difference.—Ware v. Clowney, 707

SLAVES.

1. In trespass for whipping a slave, a plea averring that defendant only punished said slave reasonably and moderately, is defective on demurrer. No person has a right to chastise a slave belonging to another, without the owner's consent, unless the authority is given to him by statute; and if he acted under such authority, he must aver it in his plea.—Townsend et al. v. Jeffries' Adm'r, 329

SLAVES—Continued.

2. The owner of certain slaves, being about to remove with them to Illinois for the purpose of emancipating them, conveyed them by absolute bill of sale to another, and took from him at the same time a bond, conditioned that he should emancipate them when reasonable compensation had been made to him for his trouble and expenses with them: *Held*, that inasmuch as there was nothing on the face of the bond requiring the obligor to emancipate the slaves in this State, his undertaking was not void, but formed a sufficient consideration for the bill of sale.—Prater's Adm'r v Darby, 496
3. The case of Trotter v. Blocker and Wife, 6 Porter 269, overruled, as to the principle stated in the first clause of the fifth head-note, which asserts that the constitutional delegation of authority to the Legislature "to pass laws to permit the owners of slaves to emancipate them," "is equivalent to a positive inhibition of the right of the owner to emancipate them except only under such regulations as the Legislature may prescribe. 496
4. The property of a free negro, who dies intestate, escheats to the State, when there are no persons who can claim as heirs-at-law; and if the State, by act of the Legislature, afterwards relinquishes all its rights to the intestate's children, born of two female slaves with whom he cohabited, neither set of children is in a condition to insist on the necessity of an inquisition to vest title in the State.—Malinda and Sarah v. Gardner, et al., 719
5. Slaves which have escheated to the State may be emancipated by an act of the Legislature, and the validity of the act can only be questioned by one who shows a right of property in himself. 719

SUPREME COURT.

1. The Supreme Court will take original jurisdiction of an application, by a member of the House of Representatives, for a *mandamus* against the Speaker of said House, to compel him to certify to the Comptroller of Public Accounts the amount to which the petitioner is entitled, as a member of said House, for mileage or *per diem* compensation.—Ex parte Pickett, 91
2 The Supreme Court will not interfere, by *mandamus*, or otherwise, to compel the dissolution of an injunction on the filing of an answer. Ex parte City Council of Montgomery, 98
3. A *certiorari* cannot be awarded to bring up an amended record, unless by consent, until the amendment has been made in the court below.—Townsend et al. v. Jeffries' Adm'r, 329
4. A case having been taken from the Supreme Court of this State to the Supreme Court of the United States, the judgment was there reversed, and the cause remanded, but the certificate of reversal did not reach the former court until after the lapse of more than nine years: *Held*, that this did not operate a discontinuance of the cause. Doe ex dem. Brown & Wife v. Clements & Hunt, 354
5. Assignments of error founded on extraneous matter in the record, which does not pertain to the case between the appellant and appellee, will be stricken out.—Hagadon v. Campbell, 375

SUPREME COURT—Continued.

6. In civil cases, no errors will be noticed which are not assigned.—Prater's Adm'r v. Darby, 496

See Bills of Exception.
Appeals and Writs of Error.
Error.

SURETIES.

1. A mortgage given to one surety, for his indemnity against a particular debt, enures to the benefit of his co-surety; and the mortgagee cannot apply the funds to any other debt than that specified in the mortgage, to the prejudice of his co-surety.—Steele v. Mealing, 285
2. If the mortgage, in such case, contains a power of sale upon default being made in the payment of the debt, and the mortgagee, after the law day of the deed, permits the property to be levied on and sold by the sheriff, under execution against the mortgagor, he is chargeable, at the suit of his co-surety, with its value; but the latter must allege such neglect in his bill, or he cannot charge the mortgagee with it. 285
3. The mortgagor's cotton having been levied on, the mortgagee became surety on the replevy bond, and the cotton was delivered to the mortgagor, who shipped it to Mobile, where it was sold by the consignees, and the proceeds were applied by them to the part payment of a debt due to them by the mortgagor, on which the mortgagee was surety, and which was one of the debts secured by the mortgage: *Held*, that the mortgagee was not entitled to a credit for what he was compelled to pay on the replevy bond, as against his co-surety on the other mortgage debts. 285
4. When the mortgagee repudiates his trust, and compels his co-surety to file a bill against him to establish it and make him account, he is not entitled, on the taking of the account, to commissions for selling the property. 285
5. When the sureties of a principal debtor are sued on a note, their principal is not a competent witness for them without a release.—Garrett et al. v. Holloway & Malone, 376
6. Under the statute authorizing the discharge of the sureties of a guardian (Clay's Digest 221 § 5, 222 § 7), the taking of a new bond is a jurisdictional fact, necessary to appear in order to give validity to the discharge; but the existence of this fact is to be determined by the judge to whom the application is made, and his decision is final and conclusive, and cannot be contradicted.—Hamner, adm'r, v. Mason et al. 480
7. Therefore, where the sureties of a guardian of several minors applied for a discharge from further liability on their bond, and a decree was thereupon rendered by the court, in which it was recited that the guardian had given a new bond, and ordered that the old sureties be discharged from all further liability: *Held*, in an action against the sureties on the old bond, that the recital in the decree was conclusive of the fact that a new bond had been given, although the name of the minor for whose use the suit was brought was entirely omitted from the new bond, which did not therefore protect his estate. 480

SURETIES—CONTINUED.

8. An execution cannot issue under the statute (Clay's Digest 305 § 45) against the sureties of a guardian, on a decree of the Orphans' Court, against the principal, embracing some items which accrued after their discharge. 480

9. An action at law on their bond does not lie against the sureties of an executor, on a decree against his administrator, rendered by the Orphans' Court on the final settlement of his executorship, under the act of 1845.—Gray v. Jenkins, 516

10. When the property of the surety, by his consent, is sold under execution against his principal (the surety not being a party to the judgment), and is bought in by the principal, through an agent, and sent back to the surety's house, the principal, although he afterwards pays the debt under which the property is sold, cannot invoke the doctrine of estoppel to defeat the surety's title.—Pond v. Wadsworth, 531

11. If the transaction was intended by the principal and surety, both being insolvent at the time, to hinder and delay the creditors of the surety, the agent who became the purchaser would hold the property against both parties, and might dispose of it as he pleased; if he did not participate in the fraud, but acted in good faith as agent of the principal, the agreement being a fraud on the surety's creditors, the principal's title would prevail against the surety; and the fact that the latter afterwards acquired the possession, would not prevent a recovery by the principal, in the absence of all proof that he acquired it under a contract with the principal; the maxim "*in pari delicto potior est conditio possidentis*," does not apply in such case. 531

12. The act of the agent, in sending the property back to the surety's house, where the principal also lived, if intended as a delivery to the principal, would vest the title in him by the delivery, and nothing could pass by a subsequent bill of sale to his administrator in trust for his estate; but the acceptance of such a bill of sale by the administrator would not preclude him from deducing title through his intestate under the previous sale consummated by delivery. 531

13. One of the debts secured by a deed of trust was described as a balance paid by the beneficiary on a certain note on which he was surety for the grantor, while the evidence showed that the debt was paid, in part, with the notes of a third person borrowed by the grantor, in payment of which he gave his bond, with the beneficiary as his surety,—that the grantor was insolvent,—that the loan was made on the credit of the beneficiary, and that the latter had paid a portion of the note, and had given his individual security for the balance: *Held*, that it was competent for the parties, as between themselves, to change their relations to each other on the debt, and to treat it as the debt of the surety; and that their relation to each other with respect to the debt did not affect the question of fraud in the execution of the deed.—Ala. Life Insurance & Trust Co. v. Pettway, 544

TAXATION.

1. Where lands are sold for taxes under the act of 1848 (Pamphlet Acts 1847-8, 21), the omission to observe all the requisitions of the statute, as to the advertisement &c., is fatal to the purchaser's

TAXATION—CONTINUED.

title, although his deed may contain all the recitals enumerated in the sixty-seventh section of the act.—Elliot v. Doe ex dem. Eddins, 508

2. The contract between the corporate authorities of Mobile and Albert Stein, by which the latter became the lessee and proprietor of the City Water Works for the term of twenty years, does not exempt his interest in said water works from taxation by the city, inasmuch as the contract contains no stipulation for such exemption. (Re-affirming Stein v. The Mayor &c. of Mobile, 17 Ala. 234).—Stein v. The Mayor &c. of Mobile, 591

3. The only legitimate object of taxation is, the support and maintenance of the government; but this does not mean the expenses incurred by the mere machinery necessarily employed in its administration and conduct: the power extends to the employment of all those means and appliances which are ordinarily adopted, or which may be calculated, to develop the resources of the State, and add to the aggregate wealth and prosperity of her citizens; such, for example, as providing outlets for commerce, opening up channels of intercommunication between different parts of the State, improving the social, moral and physical condition of her people by wholesome police regulations, and by a judicious system of public instruction, as also for the protection, security and perpetuity of her government and institutions. 591

4. The power to levy a tax for local purposes may be delegated by the Legislature to a municipal corporation; it is no objection to an act delegating such power, that it requires the assent of three-fifths of the tax-payers to be obtained before the tax is levied; and the fact that the railroad, to aid in the construction of which the tax is imposed, extends beyond the limits of the city, or even of the State, does not render it less local, or in any way affect the validity of the statute or of the tax. 591

5. The acts of January 5, 1850, and December 20, 1851, authorizing the corporate authorities of the City of Mobile to levy a tax on the owners of real estate within the limits of the city, to aid in the construction of the Mobile and Ohio Railroad, are not unconstitutional. 591

6. The City Water Works of Mobile are taxable as real estate by the corporate authorities of the city; and a lessee who holds under a contract with the corporation, by which he acquires all their corporate rights and privileges in the water works for the term of twenty years, and in perpetuity if not then redeemed by the city, is liable for the tax assessed against said water works. 591

TREASURER, STATE.

1. The amendment of the constitution, submitted to the vote of the people by the General Assembly of 1844-5, proposing *biennial* (instead of *annual*) elections of the State Treasurer and Comptroller, not having been properly ratified at the next session of the General Assembly, those officers hold their offices for the term of one year only.—Collier, Governor &c., v. Frierson et al., 100

TRESPASS.

1. In a plea in abatement, form is substance; and therefore, in trespass, a plea in abatement defending "the *wrong* and injury," instead of "the force and injury," is bad on demurrer.—Townsend et al. v. Jeffries' Administrator, 329
2. In trespass for whipping a slave, a plea averring that defendant only punished said slave reasonably and moderately, is defective on demurrer. No person has a right to chastise a slave belonging to another, without the owner's consent, unless the authority is given to him by the statute; and if he acted under such authority, he must aver it in his plea. 329
3. One who is in possession of lands under a deed purporting to convey them to him, especially when livery of seizin accompanied the delivery of the deed, has color of title, and may, when sued in trespass by a patentee from the United States, contest the validity of plaintiff's patent.—Saltmarsh et al. v. Crommelin. 347

TROVER.

1. If a slave is hired for a particular service, and is afterwards employed in a different one, this is a conversion for which the owner may bring trover, and recover the value of the slave with interest from the time of conversion; but if, with full knowledge of the conversion before the expiration of the term, he receives the stipulated hire for the entire term, he is estopped from afterwards bringing trover.—Moseley v. Wilkinson, 411
2. A widow may maintain trover for personal property belonging to the estate of her deceased husband of which she had possession several years after his death, when no letters of administration have been granted on his estate.—Brown v. Beason, 466
3. In trover, where there has been a wrongful assumption of property by defendant, which, of itself, is a conversion, no demand is necessary before suit brought. 466

TRUSTEES AND CESTUIS QUE TRUST.

1. A trustee in a deed, who is also the principal beneficiary, may come into equity, on behalf of himself and the other beneficiaries of the deed, to prevent a sale of the property under executions and attachments at law, to foreclose the deed, and to settle the conflicting liens. Such a bill is properly filed, not only as preventing a multiplicity of suits, and removing a cloud upon the title to the property, but also upon the well settled ground that a mortgagee, although he has a power of sale, may foreclose in equity.—Alabama Life Insurance and Trust Company v. Pettway, 544
2. Where an executor, by an arrangement with the creditors of the estate, obtained indulgence on the debts, which enabled him to purchase some of the property, at a sale under an order of the Chancery Court, which was had by consent, he was held to have purchased for the benefit of the estate, and not for himself individually; there being, also, some evidence of his declarations or admissions, at the time of the sale, that he was purchasing for the estate. Montgomery v. Givhan et al., 568

VENDOR'S-COURSES—CONTINUED.

1. The assignee or endorsee from the note given for the purchase money of land, cannot stand in a more equitable or better position than the original payee or vendor occupied.—Coster's Ex'rs v. Bank of Ga. et al., 37
2. When lands are purchased by a partnership from one of its members, who pledges his entire interest in the company to indemnify it against any loss which it might sustain in the purchase, and guaranties that the land can be re-sold within five years for at least the amount of the purchase money, and the lands remain unsold after the expiration of the five years, an assignee of the notes given for the purchase money cannot assert a vendor's lien, as against a member of the company who had guarantied their payment, and had paid a part of them. 37
3. Nor can an assignee of the notes assert a vendor's lien as against a remote assignee of the vendor's interest in the company, who purchased *bona fide*, for valuable consideration, without notice of any such outstanding claim or equity. 37
4. The vendor, being a member of the company, cannot assert a vendor's lien, as against subsequent creditors, or purchasers, without proving that they advanced their money with notice of his lien. 37
5. A deed which is void as to third persons on account of an adverse holding, is nevertheless valid and binding as between the parties themselves; and the fact that the vendee was in possession, as tenant of the adverse holder, does not affect the principle.—Abernathy v. Boazman, 189
6. In an action for a breach of covenant of title, evidence that the vendee himself was in possession, as tenant of an adverse holder, at the time his deed was executed, is not admissible for the vendor: the fact that both parties knew of the adverse holding, and that there was no fraud, does not relieve the vendor from the liability to make good his covenant. 189
7. The retention of possession by the vendor of a chattel, if unexplained, is only *prima facie* evidence of fraud, as against creditors, and may be explained; and if the transaction is *bona fide* throughout, and such retention of possession is consistent with good faith and the absolute disposition of the property, the title passes by the contract of sale.—Millard's Adm'rs v. Hall, 210
8. When the facts in evidence show a sufficient explanation of the vendor's retention of possession, the party alleging fraud cannot complain on error that the court referred to the jury the question of their sufficiency. As to what is a sufficient explanation of the vendor's retention of possession. 210
9. A bond for title, given by an infant, is not absolutely void, but voidable only.—Weaver v. Jones, 420
10. If an infant disaffirm his contract of sale on arriving at full age, and sue his vendee for use and occupation, the latter may recoup for valuable improvements erected on the land. 420
11. A vendee may come into equity, to enjoin a judgment at law on the notes given for the purchase money, upon alleging the vendor's fraudulent representations of title in himself, a breach of his warranty of title, and the insolvency of his estate.—Walton, adm'r, v. Bonham, 513

VENDOR AND VENDEE—Con

12. A deed made to hinder, del[illegible] , can only be declared void when attacked [illegible] , neither the grantor himself, nor his administrator, ca[illegible] up the fraud against a subsequent purchaser from him, for the purpose of showing that a good title passed notwithstanding the deed, and thus preventing the purchaser from enjoining a judgment at law on the notes given for the purchase money. 513
13. Where the vendee is allowed until the end of the year to determine whether a conditional sale shall become absolute, he may make his election at any time before the expiration of the year, and is not confined to the last day of the year only.—Reese v. Beck, ex'r, &c., 651

WAREHOUSE-MEN.

1. A want of ordinary care, in one particular, on the part of a warehouse-man, does not render him responsible for a loss occasioned by other causes not connected with that particular.—Gibson v. Hatchett & Brother, 201

WARRANTY.

1. In *assumpsit* for a breach of warranty of the soundness of a slave, the court charged the jury, "that, if defendant made any false and fraudulent representations to plaintiff, they would be considered by the jury, with the other evidence in the cause, for the purpose of determining whether there was a warranty, a breach of the warranty, and the amount of plaintiff's damages for breach of the warranty; but for that purpose only, *and not as a ground of recovery*": *Held*, that the charge was erroneous, as it asserted the proposition, that such declarations, although they might have amounted to a warranty, would not constitute a ground of recovery. —Stevenson v. Reaves, 425
2. A written contract of sale, containing a warranty of soundness, is the highest and best evidence of that warranty, and as such admissible to prove it, in *assumpsit* for its breach, although the consideration averred in the declaration is a certain sum of money, while that expressed in the written contract is defendant's acceptance for that sum.—Brown v. Jones, 463
3. In *assumpsit* for breach of warranty of the soundness of a horse, which became blind within a month after the sale, a charge based upon the condition of his eyes at the time of sale, is abstract, when the only evidence before the jury relates to their condition a month previous to that time. 463

WATER-COURSES.

1. A legislative grant to an incorporated company, conferring upon them "the exclusive right and privilege of conducting and bringing water for the term of forty years," gives them no right to divert the water of a running stream, to the injury of the riparian proprietors, without making compensation.—Stein v. Burden, 130
2. An act authorizing the lessee of certain city water works to sue out a writ of *ad quod damnum*, to ascertain the damage sustained by

WATER-COURSES—CONTINUED.

riparian proprietors from [illegible] note [illegible] a of the water of a running stream, does not deprive a[illegible] or [illegible]proprietor of his common law action for damages, on the les[illegible] failure to sue out the writ. 130

3. A municipal corporation, owning lands on a water-course from three to five miles distant from the city, has no right to divert the water from the stream, to the injury of the other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants. 130

4. Actual possession under claim of title is sufficient to sustain an action on the case for diverting water from a mill; and therefore evidence showing that plaintiff had no title to the land on which the mill was situated, is inadmissible. 130

5. A riparian proprietor is entitled to nominal damages for a diversion of the water from his mill, without any proof of actual damage. 130

6. The uniform and uninterrupted diversion of water from a running stream for a period of twenty years, gives a title by prescription: it is not necessary that the water should be used in precisely the same manner, or applied in the same way; but no change is allowed which would be injurious to those whose interests are involved. 130

7. The use of the water of a running stream for nine years confers no right.—Stein v. Ashby, 521

8. When the course of a running stream through a fractional section prevents the sub-division of the quarter sections into eighty acre tracts, under the act of Congress of April 24, 1820, the sub-division of a quarter section by the United States' surveyor into two tracts divided by the stream, is not in contravention of the act 521

9. Stein v. Burden, p. 130, re-affirmed as to the principles asserted in the first, third, seventh and eighth head-notes --Stein v. Ashby, 521

WILLS.

1. An instrument, in form a deed, containing a clause of warranty, attested by two witnesses, and conveying realty and personalty by the words "at my death I do hereby give and grant unto my son," *held* a deed, and not a will; the evidence showing that it was delivered to the grantee, who was a cripple, on the day of its date, and that it was intended as a present provision for him, to induce him to continue to live with the grantor, his mother.—Golding v. Golding's Administrator, 122

2. Fraud or undue influence in procuring one legacy, does not invalidate other legacies which are the result of the free will of the testator; but if the fraud or undue influence affects the whole will, though exercised by one legatee only, the whole will is void.—Florey's Executor v. Florey, 241

3. An insane delusion, existing in the testator's mind at the time of the execution of his will, as to the principal legatee being his son, renders the will void, if it is the offspring of that insane delusion. 241

4. Where the principal legatee, who was born in lawful wedlock, two or three years after his mother's marriage with the testator, bears the peculiar, distinctive marks of the negro, while his mother and the testator were white persons of fair complexion, the testator's belief that the legatee was his son, is admissible evidence for the purpose of showing mental delusion on this particular subject. 241

WILLS—Continued.

5. A testator bequeathed to his brother one-sixth part of the net proceeds of his estate, "to him and his heirs forever"; one-sixth to one of his sisters, "to her and her heirs forever"; one-sixth to the only daughter of a deceased sister, "to her and her heirs forever"; one-sixth to the five children of another deceased sister, "to them and their children forever"; one-sixth to another sister, "to her and her bodily heirs forever"; and one-sixth to the five children of his brother by his first wife, "to them and their heirs forever": and the residue was "to be equally divided between my (his) heirs heretofore named in the six separate divisions": *Held*, that the legacies to the two sisters and brothers, they having died before the testator, lapsed, and went to the next of kin under the statute of distribution.—Bendall's Distributees v. Bendall's Administrator, 295.

6. A will contained this clause: "I give and bequeath to my half-sister Adeline (then unmarried) all my property, of whatever kind or description, provided she shall survive me, under the following conditions: should she marry, and have lawful issue, then said property to go to her and her heirs; but, in case my said half-sister should die without any lawful issue, then, and in that case, it is my will, that all my property should go from my said half-sister to —— H., son of J. H., now living in Greenville Co., Va., to whom I give and bequeath all my property, in case of the death of my said half-sister without lawful issue, as above mentioned": *Held*, that the limitation to —— H. was not too remote, but that he took a vested interest in the property, on the death of the testator, subject to be defeated by the performance of the conditions annexed to the bequest to said Adeline; that said Adeline's estate became absolute on her marriage and birth of lawful issue, and that her husband, on the birth of such issue, might alienate the entire property.—Isbell v. Maclin et al., 315

7. When no provision is made for the wife by her husband's will, she may claim the provision which the law makes for her, without dissenting from the will as prescribed by the act of 1812 (Clay's Digest 172 § 3).—Turner v. Cole, 364

8. A testator bequeathed his slaves to his widow and five living children, with specific instructions as to their partition, and died intestate as to the residue of his personal property and all of his real estate; the seventh clause of his will provided, that, if a certain child of a deceased son should arrive at the age of twenty-one years, then the testator's widow and children should make, with what his guardian had paid him, an equivalent to their own shares at the time of division;' and the eighth clause directed, 'that all of his heirs who had received advancements should render in the amount, in valuation, at the time of the division, to be considered so much of their shares of the estate': *Held*, that the testator's said grandson, whose father had received an advancement, was entitled to a distributive share of the real and personal estate unbequeathed, on his accounting for the advancement to his father, and that the legatees of the slaves were bound to contribute from their legacies, on

WILLS—CONTINUED.

his arrival at the age of twenty-one years, so much as would make his entire estate equal to their respective portions.—Wheat v. Wheat's Executors, 429

9. The statute authorizing the summoning of a jury to try any question of fact touching the validity of a will (Clay's Dig. 304, § 35), vests in the court trying the issue a more enlarged discretion than is ordinarily exercised by courts in trying issues in civil causes.—Ex parte Henry, 638

10. The statute requiring the subscribing witnesses to a will to sign it in the presence of the testator, applies only to devises, and has no application to bequests; and therefore a will containing an attestation clause, but not attested, though void as to the realty, may be good as to the personalty, if it was really intended by the testator to operate as his will irrespective of the attestation. 638

11. Where a will of real and personal property, though containing an attestation clause, is not attested, the presumption is, that it is incomplete and is not the will of the testator; but this presumption is slight, and may be rebutted by slight circumstances; as if the testator was prevented from finishing it by the act of God, or if he intended it to operate in its present form. 638

12. The validity of a will of realty and personalty was contested on three grounds, viz., because it was not signed by the subscribing witnesses in the presence of the testator; because the testator, at the time of its execution, was of unsound mind and memory; and because it was procured by fraud and undue influence on the part of the testator's wife; the jury having returned a verdict finding it invalid generally, the court, on motion of the contestant, inquired on what their verdict was predicated, to which one of their number replied, "principally on the ground that it was not signed by the witnesses in the presence of the testator;" and the court then ordered them to retire and find another verdict: *Held*, that the contestant could not have a *mandamus* for judgment on this first verdict. 638

13. Where a verdict, finding the will invalid, is rejected by the court on the motion of the contestant himself, he cannot afterwards have a *mandamus* for judgment on it. 638

14. Where the jury return a general verdict finding the will invalid, but state to the court that their verdict is not predicated on any one of the grounds of contest, and that they cannot agree upon any one of them, their verdict may be rejected. 638

15. Where conditional words are used in a will, which, if unexplained, would prevent the vesting of a legacy, such words will not be allowed to defeat the intention of the testator, when apparent from other portions of the will, that the legacy should vest immediately: and where an absolute property is bequeathed to one at a certain period *in futuro*, and the whole of the intermediate interest is given to another, the legatee of the absolute property takes a vested interest.—Nixon v. Robbins, ex'r, &c., 663

16. Where a testator bequeathed certain slaves to his daughter, "during her natural life, with this *proviso: that if her son Thomas, now*

WILLS—CONTINUED.

an infant, should live to be twenty-one years of age," then he gave three of said negroes to his said grandson, "to him and to his heirs forever," *it was held*, that the legacy to the testator's grandson was contingent, and did not vest until he arrived at the age of twenty-one years. 663

17. An executor's assent to the legacy of a life interest in slaves, operates as an assent on his part to the legacy of a vested remainder in them; but if the remainder is contingent, and the interest in the property during the interval between the termination of the life estate and the happening of the contingency on which the remainder is to vest, is not disposed of by the will, it must be administered accordingly by the executor, and his assent to the legacy for life will have no effect whatever on the remainder. 663

WITNESS.

1. When detinue is brought against a bailee of a slave, his bailor is not a competent witness for him without a release; and the fact that the slave was hired for his victuals and clothes only, does not affect the principle.—Nelson v. Iverson, 9
2. In detinue for a slave, the defendant introduced as a witness the father of his vendor, who testified, that he held an order on defendant from said vendor for the balance of the purchase money, which was to be paid at the termination of the suit, and that said vendor had given this order as a present to his mother, who was the wife of the witness: *Held*, that the witness was incompetent, from interest, to testify for defendant.—Slaughter v. Cunningham, 260
3. Where the demand in suit is under $20, both parties being competent witnesses for every purpose, it is discretionary with the court to permit plaintiff to be re-examined for the purpose of rebutting the testimony of one of defendant's witnesses.—Stein v. McArdle & Waters, 344
4. When the sureties of a principal debtor are sued on a note, their principal is not a competent witness for them without a release.—Garrett et al. v. Holloway & Malone, 376
5. A practical surveyor, who testifies that he is familiar with the peculiar marks used by the United States' surveyors in their government surveys, may give his opinion, as an expert, whether a particular line was marked by them.—Brantly v. Swift, 390
6. In trover for the conversion of a slave, a witness who, as agent of plaintiff, brought the slave to this State, is competent to prove his own agency; and although his testimony also tends to show that the slave was sold under attachment against himself, sued out by defendant, this does not render him incompetent, if there is no evidence showing that he consented to the levy or sale.—Napier et al. v. Barry, 511
7. Where a deed of trust is attacked for fraud, a general creditor of the grantor, whose debt is not secured by the deed, is a competent witness to prove the *bona fides* of any secured debt, although he may have another security.—Ala. Life Ins. & Trust Co. v. Pettway, 544

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